DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-702
Title: Adrian Moncrieffe, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: December 8, 2011
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (10-60826)
Decision Date: November 8, 2011

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 7 2011	Petition for a writ of certiorari filed. (Response due January 9, 2012)
Jan 5 2012	Order extending time to file response to petition to and including February 8, 2012.
Feb 2 2012	Order further extending time to file response to petition to and including March 9, 2012.
Mar 9 2012	Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed.
Mar 13 2012	Reply of petitioner Adrian Moncrieffe filed. (Distributed)
Mar 14 2012	DISTRIBUTED for Conference of March 30, 2012.
Apr 2 2012	Petition GRANTED.
Apr 23 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 21, 2012.
Apr 23 2012	The time to file respondent's brief on the merits is extended to and including August 29, 2012.
Jun 8 2012	Motion to dispense with printing the joint appendix filed by petitioner Adrian Moncrieffe.
Jun 11 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 18 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jun 19 2012	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including June 22, 2012.
Jun 19 2012	The time to file respondent's brief on the merits is further extended to and including August 31, 2012.
Jun 19 2012	Counsel for the petitioner will file the reply brief on the merits on or before September 21, 2012.
Jun 22 2012	Brief of petitioner Adrian Moncrieffe filed.
Jun 28 2012	Brief amici curiae of Immigration Law Professors filed.
Jun 29 2012	Brief amicus curiae of Human Rights First filed.
Jun 29 2012	Brief amicus curiae of Center on the Administration of Criminal Law, New York

	University School of Law filed.
Jun 29 2012	Brief amici curiae of National Immigrant Justice Center, et al. filed.
Jul 23 2012	SET FOR ARGUMENT ON Wednesday, October 10, 2012
Jul 24 2012	CIRCULATED.
Aug 1 2012	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Aug 23 2012	Adminsitrative Record from Board of Immigration Appeals is electronic.
Aug 31 2012	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Sep 21 2012	Reply of petitioner Adrian Moncrieffe filed. (Distributed)
Oct 10 2012	Argued. For petitioner: Thomas C. Goldstein, Washington, D. C. For respondent: Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORDS AND BRIEFS

Supreme Court, U.S.
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11-702

No. 11-___

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tgoldstein@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The Immigration and Nationality Act provides that an alien "who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). A state law offense may constitute an "aggravated felony" if it is the equivalent of a "felony punishable under the Controlled Substances Act." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). Under the Controlled Substances Act, a person commits a felony if he possesses with intent to distribute "less than 50 kilograms of marihuana," 21 U.S.C. § 841, except that a person whose offense involves "distributing a small amount of marihuana for no remuneration" commits only a misdemeanor, *id.* §§ 841(b)(4), 844.

The Question Presented, which is also pending before the Court in No. 11-79, *Garcia v. Holder*, is:

Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adrian Moncrieffe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The precedential opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-9a) is not yet published but is available at 2011 WL 5343694 (5th Cir. Nov. 8, 2011). The administrative decisions of the Immigration Judge (Pet. App. 14a-18a) and the Board of Immigration Appeals (Pet. App. 10a-13a) are unreported.

JURISDICTION

The Fifth Circuit issued its decision on November 8, 2011. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101, 1227, and 1229a, are reproduced at Pet. App. 19a-21a. The relevant portions of the Controlled Substances Act, 21 U.S.C. §§ 841, 844, are reproduced at Pet. App. 22a-24a. The relevant portions of Georgia law, Ga. Code Ann. §§ 16-13-2, 16-13-30(j), and 42-8-62, are reproduced at Pet. App. 25a-28a.

STATEMENT OF THE CASE

Petitioner, a lawful permanent resident of the United States, pleaded guilty to possession of marijuana with intent to distribute under Georgia law, an offense that may encompass (but is not

limited to) the distribution of small amounts of marijuana for no remuneration. The record of conviction did not specify the amount of marijuana petitioner possessed or whether petitioner received remuneration. The United States sought to deport petitioner on the ground that he had committed the "aggravated felony" of "drug trafficking." The Fifth Circuit upheld the deportation order, reasoning that federal law penalizes the distribution of an unspecified amount of marijuana as a felony.

I. Statutory Background

Under the Immigration and Nationality Act (INA), an alien "who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Application of this provision to drug offenses requires navigating a "maze of statutory cross-references." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2581 (2010).

The INA defines "aggravated felony" to include, among other things, a "drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act" (CSA). 18 U.S.C. § 924(c)(2). A state law crime constitutes an aggravated felony if it describes a qualifying offense that is "punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006).

The CSA provides that, depending on the circumstances, a marijuana-related offense may be a felony or a misdemeanor. Under 21 U.S.C. § 841(b)(1)(D), a person commits a felony if his offense involves "less than 50 kilograms of

marihuana . . . except as provided in paragraph[] (4)." Under paragraph 4, a person commits a misdemeanor if his offense involves the distribution of "a small amount of marihuana for no remuneration." *Id.* § 841(b)(4) (such a violation "shall be treated as provided in" 21 U.S.C. § 844); *id.* § 844 ("simple possession" offense punished as a federal misdemeanor); *see also Carachuri-Rosendo*, 130 S. Ct. at 2581 ("a first-time simple possession offense is a federal misdemeanor" under Section 844).

II. Factual And Procedural History

1. Petitioner legally entered the United States from Jamaica at the age of three and became a lawful permanent resident in 1984. Pet. App. 2a. He has two children.

In 2008, Georgia police arrested petitioner while in possession of 1.3 grams of marijuana, which is roughly one-twentieth of an ounce, or one-half the weight of a penny. C.A. Admin. Rec. 37. Petitioner was charged with, and pleaded guilty to, the offense of "Possession of Marijuana With Intent to Distribute," pursuant to Ga. Code Ann. § 16-13-30(j)(1). That statute is not limited to any minimum amount of marijuana, nor does it require proof that the defendant obtained remuneration in exchange for the drugs. *See id.* ("It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.").

The Georgia court accepted his plea under the state's First Offender Act, Ga. Code Ann. § 42-8-62, and suspended the proceedings against him, subject

to his successful completion of five years of probation. C.A. Admin. Rec. 34.

2. In April 2010, DHS initiated removal proceedings against petitioner on the basis of his Georgia offense. Pet. App. 15a. DHS charged that petitioner had been convicted of an "aggravated felony," triggering his removal under the INA.

a. The Immigration Judge (IJ) agreed. Pet. App. 18a. The IJ applied the B.I.A.'s holding in *Matter of Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), that a state offense constitutes an aggravated felony if "the 'elements' of the [state law] offense . . . correspond to the 'elements' of an offense that carries a maximum term of imprisonment of more than 1 year under the CSA." *Id.* at 456. In the B.I.A.'s view, the only "element[]" of the analogous felony punishable under Section 841(b)(1)(D) is possession of less than 50 kilograms of marijuana with intent to distribute. *Id.* at 456-57. The separate provision relating to small amounts intended to be distributed without remuneration, the B.I.A. held, describes "a 'mitigating exception' to the otherwise applicable 5-year statutory maximum," not a separate misdemeanor offense. *Id.* at 457. Under this logic, because the absence of remuneration and the possession of only a small amount of marijuana are mitigating sentencing factors and not "elements" of a Section 841(b)(4) misdemeanor offense, *every* state law marijuana distribution offense "qualifies as a drug trafficking crime and, by extension, an aggravated felony because its elements correspond to the elements of the Federal felony of conspiracy to distribute an indeterminate quantity of marihuana." 24 I. & N. Dec. at 458.

Applying the B.I.A.'s decision in *Aruna* to this case, the IJ held that petitioner had committed the aggravated felony of "drug trafficking," notwithstanding that there was no evidence in the record of conviction that petitioner's offense involved remuneration or more than a small amount of marijuana. Pet. App. 18a.

b. Petitioner appealed to the B.I.A.. He argued that because his Georgia offense "did not require a showing of remuneration" and because he had "submitted evidence demonstrating that he actually distributed only a small amount," Pet. App. 12a, the IJ should have applied the Fifth Circuit's decision in *Jordan v. Gonzales*, 204 Fed. Appx. 425, 428 (5th Cir. 2006), which held that a state law offense is not an aggravated felony if the state law can be violated by distributing a small amount of marijuana for no remuneration. The B.I.A. rejected that argument on the ground that *Jordan* was an unpublished Fifth Circuit opinion and therefore did not displace the B.I.A.'s own decision in *Aruna*. Applying *Aruna* to this case, the B.I.A. upheld the IJ's decision.

c. Petitioner filed a petition for review of his removal order with the Fifth Circuit, which affirmed. The court began by recognizing that "[w]hen a state criminal statute covers both the felony and misdemeanor conduct proscribed by Section 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor." Pet. App. 6a. The court explained that the Second and Third Circuits hold that a state law conviction under such circumstances should be treated as a federal misdemeanor. But the panel

rejected that conclusion and instead adopted the First and Sixth Circuits' rule that such an offense is an aggravated felony because "[t]he amount of marijuana is not . . . an element that prosecutors must establish for conviction under the felony provision." *Id.* 7a. The panel also reasoned that its decision followed from prior published Fifth Circuit precedent interpreting Section 841 as not requiring a prosecutor to prove drug quantity or remuneration to a jury. *Id.* 7a-8a.

The Fifth Circuit indicated that an alien can avoid deportation in such a case by demonstrating through acceptable evidence that "he was convicted of only misdemeanor conduct" by virtue of the small amount of marijuana and lack of remuneration involved in the offense. Pet. App. 9a. But the court held that in this case, petitioner "did not offer any proof of the allegedly small amount of marihuana involved in his crime until he appealed to the B.I.A." *Id.* 9a n.4.[1]

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[1] The Fifth Circuit's statement that petitioner did not offer proof of the small amount of marijuana involved in his crime until he appealed to the B.I.A. is not correct. *See* U.S. C.A. Br. 6-7 (acknowledging that petitioner placed the evidence in the record before the IJ during bond proceedings, and that the B.I.A. acknowledged that the evidence was before it); *see also* C.A. Admin. Rec. 25, 37. The factual error does not affect the outcome of the case, however, because petitioner would not be entitled to relief under the Fifth Circuit's standard in any event. Petitioner did not submit evidence that the transactions did not involve remuneration (the other component of the misdemeanor offense), and the evidence regarding the volume of the weight of the drugs is set forth in a police chemist report, not the state record of conviction, and therefore is not probative under this

3. This Petition followed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that a first-time offender's distribution of 1.3 grams of marijuana is an "aggravated felony" requiring his deportation conflicts with this Court's decisions in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), as well as the text of the INA and CSA. The Fifth Circuit's decision also deepens an existing, acknowledged circuit conflict, pitting the First, Fifth, and Sixth Circuits, together with the B.I.A., against the Second and Third Circuits. This Court should grant certiorari to establish the correct interpretation of the INA and to restore uniformity among the lower courts on an issue that the United States acknowledges is the subject of "disagreement in the courts of appeals." BIO, No. 11-79, *Garcia v. Holder* 9.

This case is also an ideal vehicle in which to decide the question presented. In petitioner's case, the question arises in the context of petitioner's claim that he is not deportable because his offense does not constitute an "aggravated felony," as opposed to the claim that he is entitled to discretionary cancellation of removal, which may raise additional complications regarding the applicable burden of proof. The immigration judge and B.I.A. also did not indicate

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Court's "categorical approach." *See Shepard*, 544 U.S. at 16 (court may not "look to police reports" when applying the categorical approach).

that they would deny relief to petitioner on any other basis. Finally, to the extent that the structure of Georgia law suggests anything regarding the nature of petitioner's offense, it indicates that petitioner possessed only a small amount of marijuana.

I. The Fifth Circuit's Decision Conflicts With This Court's Holdings In *Carachuri-Rosendo*, *Taylor*, And *Shepard*.

A. Under This Court's Categorical Approach, State Drug Convictions Involving Indeterminate Amounts Of Marijuana And Remuneration Are Misdemeanors For Immigration Purposes Unless The Record Of Conviction Establishes Otherwise.

1. The federal courts have long applied what has come to be known as the "categorical approach" to determining whether a state offense equates to a federal offense requiring deportation under the immigration laws. If the record of conviction is unclear, the courts presume that the alien engaged in the least culpable conduct that would violate the state statute. *E.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939) (alien not removable for a crime of "moral turpitude" because his actual conviction involved an offense that could have been for non-immoral purposes, and the court must presume the less culpable conduct) (opinion of Hand, J.).

In *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009), this Court recognized that the INA's "aggravated felony" definition "contains some language that refers to generic crimes," so that the categorical approach would apply to determine

whether a state offense is equivalent to a federal crime. It placed "drug trafficking" offenses in that category. *Id.* at 2300. In *Carachuri-Rosendo*, 130 S. Ct. at 2587 n.11, this Court re-affirmed that the categorical approach governs the INA's application to drug offenses. The government must thus show from either the fact of conviction or the "record of conviction" that the defendant was convicted of conduct that would constitute a federal felony. *Id.* at 2586-87 n.12.

The categorical approach imposes the "demanding requirement" that the *government* must make "a showing that a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to [the relevant federal offense]." *Shepard*, 544 U.S. at 24 (plurality opinion); *see also Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) (Court presumes less culpable conduct because "nothing in the record of [defendant]'s 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts"). That conclusion is reinforced by the INA, which provides that the government, not a lawful permanent resident, "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." 8 U.S.C. § 1229a(c)(3)(A).

Certain state offenses are defined more broadly than a parallel federal felony – *i.e.*, some violations of the state statute would amount to a federal felony, but others would amount only to a federal misdemeanor. The *fact* of the conviction itself then does not establish whether the underlying conduct would be punishable as a felony (which would permit

removal) or a misdemeanor (which would not). Because the least culpable conduct under the statute is equivalent to a federal misdemeanor, absent proof in the record of conviction, the offense is properly treated as a misdemeanor.

2. Applied to state laws like Georgia's, which proscribe possession of marijuana with intent to distribute, this Court's categorical approach requires the United States to prove through the record of conviction that the alien's state law conviction was for something other than the least culpable conduct under state law. The minimum culpable conduct under such a statute is possession with intent to distribute of a small amount of marijuana without any remuneration. *See* Ga. Code Ann. §§ 16-13-30(j)(1). Because that conduct is indisputably only a misdemeanor under 21 U.S.C. § 841(b)(4), state law convictions such as petitioner's are presumptively misdemeanors.

In petitioner's case, there is no evidence in the record of conviction that his state offense "'necessarily' involved . . . facts equating to" the federal felony analog. *Shepard*, 544 U.S. at 24 (plurality opinion). The conduct underlying petitioner's state conviction is accordingly deemed to encompass the least culpable conduct necessary to violate the state statute – a federal law misdemeanor. *Id.*; *see also, e.g.*, *Jeune v. Att'y Gen. of U.S.*, 476 F.3d 199, 204 (3d Cir. 2007) ("[W]e must assume that [the alien's] conduct was only the minimum necessary to comport with the statute and record.").

This Court has also observed that treating a simple possession offense as "illicit trafficking" under

the INA would be "incoheren[t] with any commonsense conception of 'illicit trafficking,'" since the "everyday understanding" of "trafficking" involves "some sort of commercial dealing." *Lopez*, 549 U.S. at 53; *see also Carachuri-Rosendo*, 130 S. Ct. at 2585 (it would be "unorthodox to classify . . . simple possession recidivism as an 'aggravated felony'"). Congress is particularly unlikely to have enacted such a regime here. An alien may well have had no incentive (or even opportunity) to present drug quantity evidence at his state trial, where drug quantity and remuneration were irrelevant as a matter of state law. At the same time, even if permitted to argue in the immigration proceeding that his conduct warranted only misdemeanor treatment under federal law, that is little comfort, as this Court's categorical approach limits any review to the state record of conviction.[2]

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[2] By contrast, this Court's categorical approach – under which a state law offense entails the minimum conduct necessary to comport with the state statute – has proven perfectly workable in removal proceedings arising in the two circuits in which it has been properly applied. In cases (unlike petitioner's), in which the alien is actually guilty of conduct that would arise to the level of the federal felony, DHS has routinely been able to point to the record of conviction for evidence of the amount of marijuana or remuneration to rebut the misdemeanor presumption. *See, e.g.*, *In Re: Kenrick Robinson A.K.A. Shabba*, A041 191 561 - NEW, 2009 WL 773185, at *3 (B.I.A. Feb. 27, 2009) (alien removable for aggravated felony because criminal complaint in state offense charged him with "possess[ion] with the intent to distribute Marijuana in a quantity of 5 pounds or more"); *In Re: Corwin Carl Catwell*, A036 475 730 - YOR, 2008 WL 4420099, at *2 & n.2 (B.I.A. Sept. 19, 2008) (alien's state law offense constituted an aggravated

In contravention of this Court's precedents, and of the plain text of the INA, which puts the burden on the government to prove deportability, the court of appeals assumed without any evidence in the record of conviction that petitioner possessed more than a small amount of marijuana or received remuneration. Pet. App. 9a. Certiorari is warranted to correct that conflict with this Court's decisions.

B. The Fifth Circuit Was Wrong To Depart From This Court's Categorical Approach.

The Fifth Circuit provided two explanations for departing from this Court's precedent. Neither is persuasive.

The Fifth Circuit maintained that Section 841(b)(4)'s misdemeanor provision is a "mitigating sentencing provision" and not a stand-alone offense, such that it is proper to presume that any state drug distribution offense is equivalent to a federal felony so long as it contains the "elements" of the federal felony offense. Pet. App. 7a.

This Court's holding in *Carachuri-Rosendo* establishes that the elements of a federal offense are not determinative of whether an alien commits an "aggravated felony." In that case, the Court held that an alien can be found to commit the aggravated felony of recidivist drug possession only if the record of conviction demonstrates that the defendant is a recidivist. The Court acknowledged that, as the United States emphasized, the relevant federal law

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felony because the "record of conviction clearly establishes the amount of marihuana possessed": 120.5 grams).

"define[d] simple possession by reference to statutory *elements*, but facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as elements in the traditional sense." *Id.* at 2583-84 (emphasis in original) (internal quotation marks and citation omitted). But the Court held that in the immigration context, the question under the categorical approach is not whether the elements of a state offense match the elements of a federal offense, but rather whether the conduct underlying the state law conviction, as revealed in the record of conviction, is necessarily punishable as a felony. *Carachuri-Rosendo*, 130 S. Ct. at 2582-83 ("Our holding in *Lopez* teaches that, for a state conviction to qualify as an 'aggravated felony' under the INA, it is necessary for the underlying conduct to be punishable as a federal felony." (citing *Lopez* 549 U.S. at 60)). Thus, the Fifth Circuit's emphasis on the "elements" of the offense as stated in 21 U.S.C. § 841(a) – to the artificial exclusion of Congress's clear statement in 21 U.S.C. § 841(b)(4) that "any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a misdemeanor offender – cannot be reconciled with *Carachuri-Rosendo*.

The Fifth Circuit's "elements" theory also proves far too much. Taken to its logical conclusion, an alien would commit an "aggravated felony" under a statute such as Georgia's even if the record of conviction conclusively showed that he possessed only a small amount of marijuana and did not receive any remuneration. In such a case, the state offense's "elements" equally correspond to what the Fifth

Circuit deemed to be a distinct federal felony. That cannot be right, and the Fifth Circuit did not defend the conclusion that follows from its own reasoning.[3]

The Fifth Circuit also invoked its precedent holding that in a prosecution under Section 841 a federal prosecutor need not prove remuneration or quantity of marijuana to a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 7a-8a. But *Apprendi* is irrelevant here: the question is not *who* (the jury or the judge) must decide if the alien has been convicted of a felony, but *whether* the offense was a felony at all. The Sixth Amendment says nothing about that question. It makes no difference under the INA whether federal law classifies conduct as a misdemeanor by defining a separate misdemeanor offense or by subjecting a single offense to felony or misdemeanor punishment depending on sentencing factors.

II. The Courts Of Appeals Are Split Three Ways With Respect To The Question Presented.

The courts of appeals are in deep and acknowledged conflict with respect to the question

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[3] If an alien were prosecuted in federal court for conduct involving possession of a small amount of marijuana and no remuneration, the alien could introduce evidence regarding the lack of remuneration and quantity of marijuana and receive only misdemeanor punishment (and no removal as an aggravated felon). Under the logic of the "elements" argument, however, the same alien convicted of the same conduct and who introduced the same evidence under a *state* possession-with-intent-to-distribute statute would be removable as an aggravated felon.

presented. As the court below recognized, "[w]hen a state criminal statute covers both the felony and misdemeanor conduct proscribed by § 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor." Pet. App. 6a. The government itself concedes the "disagreement in the courts of appeals concerning the question presented." *Garcia* BIO 9.

There is no realistic prospect that the conflict can be resolved absent this Court's intervention, because the B.I.A. has acquiesced to the precedent of the Second and Third Circuits in cases arising in those jurisdictions. *Id.* 20 n.16. There is accordingly little chance that a case presenting the question can arise again in those courts. Certiorari is therefore warranted.

1. The Second and Third Circuits hold that a state law drug conviction involving no proof of either remuneration or a specified amount of marijuana is a misdemeanor for removal purposes unless the record of conviction establishes otherwise. In *Jeune v. Attorney General*, 476 F.3d 199, 200 (3d Cir. 2007), the Third Circuit considered the case of an alien who, like petitioner, had been arrested and charged with possession of marijuana with intent to distribute in violation of state law. The court applied this Court's categorical approach to determine whether the state law offense could be considered the equivalent of the federal felony described in Section 841. 476 F.3d at 201-02. The court began with the presumption that the alien's "conduct was only the minimum necessary to comport with the [state drug] statute and record." *Id.* at 204. The court then noted that the record of

the alien's state conviction contained "no indication that [the alien] was distributing marijuana for money," nor did it provide information as to "the amount of marijuana that [the alien] may have possessed." *Id.* at 205. The Third Circuit therefore refused to consider the alien's state law offense an aggravated felony under the INA. *Id.*; *see also Evanson v. Attorney Gen.*, 550 F.3d 284, 293-94 (3d Cir. 2008); *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3d Cir. 2003).

The Second Circuit adopted the same rule in *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008). The court explained that under the categorical approach "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant." *Id.* at 118 (citations omitted). The court determined that the alien's state law offense could not be considered an aggravated felony because his conviction "could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Id.* at 115, 120; *see also Dias v. Holder*, No. 08-73051, 2011 WL 4431099, at *1 (9th Cir. Sept. 23, 2011) (state law conviction for criminal sale of marijuana in the fourth degree is not automatically an aggravated felony because in view of Section 841(b)(4), such an offense is not "necessarily punishable as a felony under the federal drug laws").

2. The Board of Immigration Appeals, along with three courts of appeals, takes the opposite approach, holding that a state law drug conviction involving no

proof of remuneration or a specified amount of marijuana is at least presumptively an aggravated felony.

The B.I.A. adopted this rule – to which it adheres in every case arising outside of the Second and Third Circuits – in *Matter of Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008). In *Aruna*, the B.I.A. ruled that a state offense is an "aggravated felony" whenever its "elements" correspond to the "elements" of a federal law felony. *Id.* at 456. Because the presence of remuneration and more than a small amount of marijuana are merely a "mitigating exception" and not statutory elements as provided in 21 U.S.C. § 841(b)(4), the B.I.A. held that *every* state law marijuana possession with intent to distribute offense qualifies as "an aggravated felony because its elements correspond to" the actual elements of the federal felony described in Section 841(a). *Id.* at 457, 458.

The First, Fifth, and Sixth Circuits have adopted the B.I.A.'s position. Pet. App. 7a (agreeing with the First and Sixth Circuits); *Garcia v. Holder*, 638 F.3d 511, 519 (6th Cir. 2011) ("[B]ecause the amount of marihuana is not an element of the relevant federal felony, Garcia's state conviction is an aggravated felony under the categorical approach."); *Julce v. Mukasey*, 530 F.3d 30, 35 (1st Cir. 2008) ("[T]he same elements required under Massachusetts law to establish the offense of possession with intent to distribute marijuana, if proven in a federal prosecution under § 841, would establish a felony offense." (citation omitted)).

There is moreover a division among those courts as to whether, when a state law offense maps on to

the federal felony in Section 841, the alien may nevertheless prove that the facts of *his particular case* amount to a misdemeanor involving both a small quantity of marijuana and no remuneration. The logic of the B.I.A.'s decision in *Aruna* suggests that an alien can never make such a showing: even if there is conclusive evidence that the alien in fact distributed a small quantity of marijuana for no remuneration, the "elements" of the state offense still correspond to the "elements" of the aggravated felony of marijuana distribution. *Aruna*, 24 I. & N. Dec. at 456.[4] The Sixth Circuit adopted precisely such a *per se* position in *Garcia*. 638 F.3d at 516. That court reasoned that it would find a state law possession-with-intent-to-distribute offense to be an aggravated felony "even if we were to assume that the conduct

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[4] Notwithstanding the logic of its ruling in *Aruna*, that opinion contains a footnote suggesting that it may be possible for an alien to prove that his offense only involved misdemeanor conduct. 24 I. & N. Dec. at 458 n.5 (the alien "made no effort during his proceedings before the Immigration Judge to prove that the quantity of marijuana in his offense was 'small' or that his offense involved a conspiracy to distribute marijuana for no remuneration, beyond his mere assertion of such, nor does he request a remand for this purpose."); *see also In re Dudley*, No. A043-092-703 - BAL, 2011 WL 899580, at *4-*5 (B.I.A. Feb. 14, 2011). But the B.I.A. did not take this approach in petitioner's case, where the board acknowledged that petitioner "has submitted evidence demonstrating that he actually distributed only a small amount" of marijuana, but (applying *Aruna*) held categorically that he had committed an aggravated felony because "the elements of [his] offense correspond to the elements of the Federal felony offense of possession with intent to distribute an indeterminate quantity of marijuana." Pet. App. 12a, 13a.

underlying [Garcia's] state conviction was the minimum criminal conduct necessary to sustain the conviction," which is to say, conduct corresponding to the federal misdemeanor. *Id.* at 518.

By contrast, the First and Fifth Circuits have stated that the alien may attempt to prove that the facts of his individual case would constitute a federal misdemeanor. *See* Pet. App. 9a ("Moncrieffe bore the burden to prove that he was convicted of only misdemeanor conduct."); *Julce*, 530 F.3d at 35-36 (alien may attempt to "meet the burden, which is his to bear, that his conduct of conviction fell within § 841(b)(4)"). Thus, in the event that this Court grants review and rules in favor of the default felony approach, it should decide whether an alien may attempt to rebut that default presumption and, if so, on what evidence he may rely to make such a showing.

III. The Question Presented Is Of Substantial And Recurring Importance.

The question whether a conviction under a state statute that encompasses but is not limited to remuneration or a significant amount of marijuana nevertheless constitutes an aggravated felony is of paramount importance for several reasons. The question governs not only whether a lawful permanent resident may be removed from the United States, 8 U.S.C. § 1227(a)(2)(A)(iii), but also whether the alien may be eligible for discretionary cancellation of removal, *see id.* § 1229b(a)(3) (lawful permanent resident may seek such relief if convicted only of a controlled substance offense, but not if convicted of an aggravated felony). An aggravated

felony determination generates significant post-removal consequences as well. Such a person is permanently foreclosed from seeking readmission to the United States, 8 U.S.C. § 1182(a)(9)(A)(ii), cannot apply for asylum, 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i), and is barred from demonstrating the "good moral character" needed for naturalization, 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.2(7).

The question presented also affects hundreds, if not thousands, of persons every year. Drug convictions constitute the number one criminal basis for removal of aliens from the United States. Of the 168,532 aliens removed from the United States in 2010 due to a criminal offense, 42,692 (roughly one out of every four) were removed for a drug crime. Department of Homeland Security, *Immigration Enforcement Actions* at 4, *available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf* (June 2011). The question presented thus arises with great frequency in the lower courts and the Board of Immigration Appeals, and this Court's intervention is needed to address this important and frequently recurring question of law.[5]

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[5] In the three-and-a-half years since the B.I.A. decided *Aruna*, that tribunal has issued twenty-nine additional rulings in cases raising similar basic facts as reported in *Administrative Decisions Under Immigration and Nationality Laws*, in addition to what are presumably numerous other unreported cases such as petitioner's.

IV. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case also presents an excellent vehicle for this Court's resolution of the question presented. At every step of the proceedings, petitioner properly raised and preserved his argument that his state law conviction should not be considered an aggravated felony for removal. Although not admissible under this Court's "categorical approach," the evidence that petitioner possessed only 1.3 grams of marijuana also demonstrates the illogic of the government's position that petitioner committed the "aggravated felony" of "drug *trafficking*."

Further, the Georgia statutory scheme unambiguously encompasses the distribution of small amounts of marijuana for no remuneration. No provision of the statute suggests that petitioner distributed a larger quantity of drugs. To the contrary, the statute suggests that petitioner possessed only a small amount of marijuana. *See* Ga. Code Ann. §§ 16-13-30(j)(1), 16-13-2(b).

There also is no doubt that if this Court adheres to its precedent applying the categorical rule to this question, it will reverse the Fifth Circuit's judgment. As the court of appeals acknowledged, "[t]he charging document and Georgia judgment did not indicate how much marijuana Moncrieffe possessed [and] the government did not prove that there was remuneration or more than a small amount of marijuana." Pet. App. 3a.

Moreover, in this case, the question presented arises in the ordinary context in which the alien alleges that he is not subject to deportation because

he did not commit an aggravated felony. In other cases, by contrast, the alien seeks relief from the United States in the form of discretionary cancellation of removal. In such cases, complications may arise regarding the question whether the alien bears some further burden of proof. 8 U.S.C. §§ 1229b(a)(3), 1229a(c)(4)(A)(i); *see Garcia* BIO 15-16.

Relatedly, in cases that arise in the distinct context of requests for cancellation of removal, the immigration judge may suggest that the alien would be denied relief on other grounds. Given a choice, this Court's general practice has been to grant review in a case in which the question is certain to determine the eventual judgment. This is such a case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tgoldstein@goldsteinrussell.com

December 7, 2011

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10–60826

ADRIAN PHILLIP MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Nov. 8, 2011 | As Corrected Nov. 14, 2011

Before: JONES, Chief Judge, HAYNES, Circuit Judges, and CRONE, District Judge.[1]

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[1] District Judge, Eastern District of Texas, sitting by designation.

Opinion

EDITH H. JONES, Chief Judge:

Adrian Moncrieffe petitions for review of a removal order of the Board of Immigration Appeal's ("BIA"). After he pled guilty to possessing marijuana with intent to distribute in Georgia, the Department of Homeland Security ("DHS") charged Moncrieffe with being removable for this crime, which it contends should be considered a felony under the Controlled Substances Act ("CSA") and an "aggravated felony" under immigration law. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). The immigration judge ("IJ") agreed, and on appeal, the BIA endorsed the felony classification and dismissed Moncrieffe's appeal. For the following reasons we DENY the Petition for Review.

BACKGROUND

Moncrieffe, a native of Jamaica, entered the United States legally as a permanent resident in 1984 at the age of three. Moncrieffe pled guilty to "Possession of Marijuana With Intent to Distribute" under Georgia law in 2008 and was sentenced to five years probation. Because of his guilty plea, DHS charged Moncrieffe with being removable under both 8 U.S.C. § 1227(a)(2)(B) relating to controlled substances offenses and under § 1227(a)(2) "as an aggravated felon" because the conviction was for a "drug trafficking crime" as defined by 18 U.S.C. § 924(c).[2] DHS produced the Georgia judgment and

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* District Judge, Eastern District of Texas, sitting by designation.

charging document at the immigration hearing in support of its position. The IJ ruled that the state conviction was analogous to a federal felony under 21 U.S.C. § 841(a)(1) and that Moncrieffe was thus removable as an aggravated felon.

Moncrieffe appealed to the BIA arguing that the Georgia crime should not be considered an aggravated felony. Moncrieffe argued that GA.CODE § 16–13–30(j) punishes acts that are equivalent to misdemeanors under the CSA. Specifically, distribution of "a small amount of marijuana for no remuneration" falls under the Georgia provision but is only a misdemeanor under 21 U.S.C. § 841(b)(4). The charging document and Georgia judgment did not indicate how much marijuana Moncrieffe possessed. Because the government did not prove that there was remuneration or more than a small amount of marijuana, Moncrieffe argued that his conviction should be considered a federal misdemeanor. In an unpublished Fifth Circuit case, *Jordan v. Gonzales,* 204 Fed.Appx. 425 (5th Cir.2006), this court held that a conviction for possession of marijuana with intent to distribute was considered a federal misdemeanor under 21 U.S.C. § 841(b)(4) in the absence of proof of remuneration or of more than a small amount of marijuana.

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[2] BIA did not rule on, and we do not consider, whether the Georgia conviction constituted a "controlled substances" violation for purposes of removal.

The BIA was not swayed by *Jordan*. Under BIA precedent, a state conviction for possessing an indeterminate amount of marijuana with intent to distribute is considered an aggravated felony under the CSA. *In re Matter of Aruna*, 24 I. & N. Dec. 452, 2008 WL 512678 (BIA Feb. 26, 2008). The BIA found no reversible error in the IJ's decision to follow its precedent rather than an unpublished, non-precedential circuit court opinion. Moncrieffe petitions for a review of the BIA decision dismissing his appeal.

STANDARD OF REVIEW

This court has jurisdiction to review questions of law in petitions from the BIA. 8 U.S.C. § 1252(a)(2). We review such questions *de novo*. *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir.2002). Whether a prior state conviction falls within the federal definition of aggravated felony is also reviewed *de novo* because "[d]etermining a particular federal or state crime's elements lies beyond the scope of the BIA's delegated power or accumulated expertise." *Id.* We review only the BIA decision "unless the IJ's decision has some impact on the BIA's decision." *Mikhael v. INS*, 115 F.3d 299, 306 (5th Cir.1997). Factual findings are reviewed for substantial evidence and are overturned only if "the evidence is so compelling that no reasonable factfinder could reach a contrary conclusion." *Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir.2006).

DISCUSSION

An alien who is convicted of an "aggravated felony" is removable. 8 U.S.C. § 1227(a)(2)(A)(iii).

"Drug trafficking crimes" are considered "aggravated felonies." 8 U.S.C. § 1101(a)(43)(B). "Drug trafficking crimes" include any felony punishable under the CSA, see 18 U.S.C. § 924(c)(2), even if the offense is a misdemeanor under state law. *Lopez* v. *Gonzales*, 549 U.S. 47, 60, 127 S.Ct. 625, 633, 166 L.Ed.2d 462 (2006) (noting that there "is no reason to think Congress meant to allow the States to supplant its own [misdemeanor/felony] classifications when it specifically constructed its immigration law to turn on them"). Felonies under § 924(c)(2) are those crimes that are punishable by more than one year in prison. *Lopez*, 549 U.S. at 56 n. 7, 127 S.Ct. at 631 n. 7.

The Fifth Circuit uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA. *Omari v. Gonzales*, 419 F.3d 303, 307 (5th Cir.2005). Under the categorical approach, the court considers whether the elements of the state statute are analogous to a federal felony instead of looking at the underlying facts of the crime. *Id.* If a state statute is divisible, meaning that some conduct would be punished as a felony but other conduct only punished as a misdemeanor under the CSA, then some evidence of the underlying criminal act can be considered in the determination. *Id.* at 308. We have limited the government to presenting evidence approved in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to determine whether a guilty plea conviction under a divisible state law was an aggravated felony. *Omari*, 419 F.3d at 308. Acceptable evidence includes the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual

finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16, 125 S.Ct. at 1257.

Ordinarily, convictions for possession with intent to distribute are felonies under the CSA. *See* 21 U.S.C. § 841. A subsection of the provision, however, provides for misdemeanor treatment for distribution of small amounts of marijuana without remuneration. 21 U.S.C. § 841(b)(4). When a state criminal statute covers both the felony and misdemeanor conduct proscribed by § 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor. The First and Sixth Circuits hold that the default punishment under § 841 is a felony, while the Second and Third Circuits hold that the default punishment is a misdemeanor.[3] In an unpublished opinion preceding these circuit cases, *Jordan*, 204 Fed.Appx. 425, this court held that when there was no evidence of how much marijuana was involved or of remuneration, the state conviction could not be considered a federal felony. *Jordan*, however, conflicts with published Fifth Circuit precedent construing the CSA. We decline to follow it and adopt the First and Sixth Circuits' approach.

While acknowledging the circuit split, the Sixth Circuit recently ruled that the felony provision, not

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[3] *Garcia v. Holder*, 638 F.3d 511 (6th Cir.2011); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir.2008); *Julce v. Mukasey*, 530 F.3d 30, 34–36 (1st Cir.2008); *Jeune v. Attorney General*, 476 F.3d 199 (3d Cir.2007).

the misdemeanor subsection (§ 841(b)(4)), is "the default provision for punishing possession of the drug with intent to distribute." *Garcia*, 638 F.3d at 516. The amount of marijuana is not, the court noted, an element that prosecutors must establish for conviction under the felony provision. *Id.* (citing *United States v. Bartholomew*, 310 F.3d 912, 925 (6th Cir.2002)). As a result, the misdemeanor provision "is 'best understood as a mitigating sentencing provision' and not 'a stand alone misdemeanor offense.' " *Id.* (quoting *Julce*, 530 F.3d at 34–36).

The Second and Third Circuits, in contrast, focus on the doctrine of "least culpable offense." *Martinez*, 551 F.3d 113; *Jeune*, 476 F.3d 199. The Second Circuit emphasized that "only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant" to the categorical approach. *Martinez*, 551 F.3d at 118 (quoting *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 143 (2d Cir.2008)). Because a New York statute covered offenses involving only two grams of marijuana, the court concluded that the conviction at issue could possibly have been a non-remunerative transfer of a small amount of marijuana and therefore should be treated as a misdemeanor under § 841(b)(4). *Id.* at 120.

Published Fifth Circuit case law compels us to reject the Second Circuit's approach and agree with the First and Sixth Circuits. In *United States v. Walker*, 302 F.3d 322, 324 (5th Cir.2002), this court held that the default sentencing range for a marijuana distribution offense is the CSA's felony provision, § 841(b)(1)(D), rather than the

misdemeanor provision. Prior to *Walker*, this court held that for sentencing purposes, when no jury determination of drug quantity is available, the default punishment is a felony-based maximum of five years under § 841(b)(1)(D). *United States v. Garcia*, 242 F.3d 593, 599 (5th Cir.2001). The First Circuit relied on *Walker* as evidence that the default punishment for any possession of marijuana with intent to distribute is equivalent to a felony under the CSA and that the defendant bears the burden of producing mitigating evidence in order to qualify for misdemeanor treatment. *Julce*, 530 F.3d at 35. We adopt the same interpretation of § 841 for immigration purposes as for sentencing purposes. *United States v. Hernandez–Avalos*, 251 F.3d 505, 509 (5th Cir.2001) ("We fail to see the validity of interpreting this statute differently based on this distinction between sentencing and immigration cases; it is, after all, the same words of the same phrase from the same statute that is being interpreted in each instance."), *overruled on other grounds*, *Lopez*, 549 U.S. at 60, 127 S.Ct. at 633; *see also Lopez*, 549 U.S. at 58, 127 S.Ct. at 632 (concluding that Congress incorporated "its own statutory scheme of felonies and misdemeanors" in the immigration removal context). While this approach conflicts with the unpublished opinion in *Jordan*, it is important to follow our published Fifth Circuit sentencing cases. *See Garcia*, 638 F.3d at 517–18 (Sixth Circuit "declin[ing] to interpret a drug-based aggravated felony differently in immigration and criminal-sentencing contexts"). *But see Martinez*, 551 F.3d at 121 (Second Circuit acknowledges conflict

between its own sentencing and immigration cases interpreting § 841).

Based on this reading of § 841, we deny Moncrieffe's Petition for Review. He pled guilty to possession of marijuana with intent to distribute under GA.CODE § 16–13–30(j). Even if that section of the Georgia code could cover conduct that would be considered a misdemeanor under § 841(b)(4), Moncrieffe bore the burden to prove that he was convicted of only misdemeanor conduct. *In re Matter of Aruna*, 24 I. & N. Dec. at 457.[4] Otherwise, as is true for federal defendant charged under § 841, his crime is equivalent to a federal felony. The petitioner's other arguments are without merit.[5]

Petition **DENIED**.

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[4] Moncrieffe did not offer any proof of the allegedly small amount of marijuana involved in his crime until he appealed to the BIA. This was untimely under BIA rules. 8 C.F.R. § 1003.1(d)(3)(iv). Therefore, we need not address the question of what quality and quantum of proof must be offered by the defendant to show that his drug quantity qualifies for treatment under 21 U.S.C. § 841(b)(4). The evidence, even if admissible, could not be addressed in the first instance on appeal.

[5] Petitioner's argument that the state crime was considered a misdemeanor by the state is irrelevant given the Supreme Court's holding in *Lopez*. 549 U.S. at 60, 127 S.Ct. 625 (noting that there "is no reason to think Congress meant to allow the States to supplant its own [misdemeanor/felony] classifications"). The petitioner's reliance on *Carachuri–Rosendo v. Holder*, — U.S. ——, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010), is also misplaced because that case merely held that uncharged and unproven recidivism could not convert a misdemeanor into an aggravated felony. Moncrieffe was charged and pled guilty to the conduct for which he was removed.

APPENDIX B

DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A038 581 600 – Oakdale, LA
Date: Sep 20, 2010

In re: ADRIAN PHILLIP MONCRIEFFE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Angel L. Arias, Esquire

ON BEHALF OF DHS: Daniel J. Redwood
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] –
Convicted of controlled substance violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] –
Convicted of aggravated felony (as defined under section 101(a)(43)(B))

APPLICATION: Termination of proceedings

The respondent appeals from an Immigration Judge's May 26, 2010, decision. In that decision the immigration judge, *inter alia*, found the respondent, a native and citizen of Jamaica and a lawful permanent resident of the United States, removable as an alien convicted of an aggravated felony on the basis of his June 30, 2008, plea of guilty in Georgia in the Superior Court of Houston County, Georgia, to the offense of possession of marihuana with intent to distribute. The Immigration Judge concluded that this offense qualified as an aggravated felony under section 101(a)(43)9B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), to wit, a "drug trafficking crime." The appeal will be dismissed.

The record of proceedings in the instant case contains a plea of guilty to the offense of possession of marihuana with intent to distribute. The judgment provides that on June 30, 2008, the respondent, entered the plea of guilty, to the offense of possession of marihuana with intent to distribute, thus violating section 16-13-30(j) of the Georgia Code Annotated, a felony. The proceedings were deferred and the respondent was placed on probation for 5 years.

The Immigration Judge determined that the respondent's offense constitutes an aggravated felony under section 101(a)(43)(B) of the Act. We find no merit to the respondent's argument that his conviction under section 16-13-30(j) of the Georgia Code Annotated is not an aggravated felony under section 101(a)(43)(B) of the Act. A state offense constitutes a felony punishable under the Controlled

Substances Act (CSA) if it proscribes conduct punishable as a federal felony. *See Lopez v. Gonzales*, 549 U.S. 625, 46 (2006) (holding that a state drug offense only equates to a felony under the CSA, 21 U.S.C. § 801, et seq., if it proscribes conduct punishable as a felony under the CSA). The respondent's offense, possession of marihuana with intent to distribute, qualifies as a drug-trafficking aggravated felony because the crime, which contains a trafficking element, is analogous to the federal offense of possession of marihuana with intent to distribute, a felony violation of the CSA. *See* 21 U.S.C. § 841(a)(1) (making it a felony offense to knowingly or intentionally possess with intent to distribute or dispense cannabis). A drug offense is a felony under the CSA if it is punishable by a term of imprisonment of more than 1 year. 21 U.S.C. §§ 802(13), (44); 18 U.S.C. § 3559(a). Absent enhancements for quantity and recidivism, possession of cannabis with intent to distribute is punishable under the CSA by a maximum term of imprisonment of 5 years. *See* 21 U.S.C. § 841(b)(1)(D).

The respondent does argue that, as the conviction did not require a showing of remuneration and he has submitted evidence demonstrating that he actually distributed only a small amount, the Immigration Judge should have applied controlling precedent in the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this matter arises, and not *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008). He avers that in *Jordan v. Gonzales*, 204 Fed. Appx. 425 (5th Cir. 2006), the court held that, where

a statute can be violated by distributing a small amount of marihuana for no remuneration, it is not categorically a "drug trafficking" aggravated felony. *See* 21 U.S.C. § 841(b)(4) (any person who violates 21 U.S.C. § 841(a) by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844, for simple possession of marihuana, punishable as a misdemeanor). However, not only was *Jordan v. Gonzales*, *supra*, issued before *Lopez v. Gonzales*, but it was not issued as a precedent decision. As the elements of the respondent's offense correspond to the elements of the Federal felony offense of possession with intent to distribute an indeterminate quantity of marijuana, we find no reversible error in the Immigration Judge's determination that the respondent is removable based on his aggravated felony conviction. Based on the foregoing, we need not address the remaining arguments presented on appeal; the appeal will be dismissed. *See Matter of Aruna*, *supra*.

Accordingly, the following order shall be issued.

ORDER: The appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
Adrian MONRIEFFE	)	**File No.: A38-581-600**
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at any time after admission you have been convicted of an aggravated felony.

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that any time after admission, you have been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled

Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

On Behalf of Respondent	On Behalf of the Department
Angel Arias, Esq.	Assistant Chief Counsel
5901 NW 183 Street	DHS/ICE/Litigation Unit
Suite 311	1010 E. Whatley Road
Miami Gardens, FL 33015	Oakdale, LA 71463

DECISION OF THE IMMIGRATION JUDGE

On April 27, 2010, the Department of Homeland Security (DHS) initiated immigration proceedings against the Respondent by issuing him a Notice to Appear (NTA). In the NTA, DHS alleged that the Respondent is a native and citizen of Jamaica was (sic) admitted to the United States at New York, New York on October 10, 1984 as a lawful permanent resident. The DHS further alleged that the Respondent was convicted for the offense of Possession of Marijuana with Intent to Distribute in violation of Georgia Code Section 16-13-30(J).

Based on these allegations the DHS charged the Respondent as removable pursuant to Sections 237(a)(2)(A)(iii) [aggravated felony] and 237(a)(2)(B)(i) [controlled substance] of the Act. On May 14, the Respondent filed a motion to terminate. On May 21, the DHS filed its opposition to the motion. On May 25, the Respondent appeared in

Court with counsel and admitted the allegations contained in the NTA but denied that he was removable as charged.

When analyzing a particular offense to determine whether it constitutes an aggravated felony, courts apply a "categorical approach" and look only to the statutory definition of the offense, they do not consider the factual circumstances surround (sic) the particular violation. Taylor v. U.S., 495 U.S. 575 (1990); Matter of Pichardo Sufren, 21 I&N Dec. 330 (BIA 1996). When the statute defines multiple offenses, some which (sic) are aggravated felonies and some which are not, the courts use a "modified categorical approach." Larin-Ulloa v. Gonzales, 462 F.3d 456, 464 (5th Cir. 2006). Under such a divisible statute, the court may examine evidence additional to the statute such as the record of conviction, charging document, written plea agreement, and transcript of the plea colloquy to determine whether the conviction is for an aggravated felony under a part of the statute. Id. The record of conviction includes an official record of judgment and conviction. See INA § 240(c)(3)(B); 8 C.F.R. § 1003.41(a).

The Respondent's charge of removal is dependent on whether his Georgia state conviction is an aggravated felony. Under Section 101(a)(43)(B), illicit trafficking in a controlled substance (as defined in Section 102 of the Controlled Substance (sic) Act), including a drug trafficking crime (as defined in Section 914(c) of Title 18, United States Code) is an aggravated felony. "Drug trafficking crime" is defined as any felony punishable under the

Controlled Substances Act. Smith v. Gonzales, 468 F.3d 272, 275 (5th Cir. 2006); 18 U.S.C. § 924(c)(3). Under the controlled (sic) Substances Act, felonies are defined as those crimes for which it assigns a punishment exceeding one year's imprisonment. Lopez v. Gonzales, 549 U.S. 47, 56 (2006). The United States Supreme Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." Id. at 60.

In applying the categorical approach, the Court looked at the statute under which the Respondent was convicted. The Respondent was convicted under Georgia Code Section 16-13-30(J), which states, in pertinent part:

> (j)(1) It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

Because the statute is divisible and may extend to conduct that does not constitute an aggravated felony, the Court applied the modified categorical approach. The conviction record indicates that the Respondent pleaded guilty to "Possession of Marijuana with Intent to Distribute." Under 21 U.S.C. § 841(a)(1), it is unlawful for any person to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. Under 21 U.S.C. § 812(c), marijuana is a controlled substance. Possession with intent to distribute is punishable under 21 U.S.C. §

841(b)(1)(D) by a term of imprisonment of up to 5 years, making it a federal felony. The Respondent's Georgia conviction of possession with intent to distribute corresponds with 21 U.S.C. § 841(a)(1). Therefore, the Respondent's state conviction would be punishable as a federal felony. As such, the Respondent's offense constitutes a drug trafficking aggravated felony. See also, Matter of Aruna, 24 I&N Dec. 452 (BIA 2008).

This Court, based on the Respondent's admissions, found the Respondent removable as charged. The Respondent, through counsel, designated Jamaica as the country for removal and sought no relief from this Court's finding of removability. This Court ordered Respondent removed to Jamaica on the charges contained in the NTA.

Accordingly, the following order shall be entered:

ORDER: IT IS HEREBY ORDERED THAT the Respondent's motion to terminate be DENIED

IT IS HEREBY FURTHER ORDERED THAT the Respondent be REMOVED from the United States to Jamaica.

5/26/2010
Date

/s/
John A. Duck, Jr.
Immigration Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

8 U.S.C. § 1101

Definitions

(a) As used in the chapter –

(43) The term "aggravated felony" means –

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

8 U.S.C. § 1227

Deportable Aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

. . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. 1229a

Removal proceedings

(c) Decision and burden of proof

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

21 U.S.C. § 841.

Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight . . . such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title .

21 U.S.C. § 844

Penalties for simple possession

(a) Unlawful acts; penalties

Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000 .

Ga. Code Ann. § 16-13-2

Conditional discharge for possession as first offense

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a

conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed $1,000.00, or both, or public works not to exceed 12 months.

Ga. Code Ann. § 16-13-30

Possession, manufacturing, etc. of certain controlled substances

(j) (1) It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

(2) Except as otherwise provided in subsection (c) of Code Section 16-13-31 or in Code Section 16-13-2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

Ga. Code Ann. § 42-8-62

Discharged defendant not to be considered to have criminal conviction; exception; records of probation

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. Except for the registration requirements under the state sexual offender registry and except as otherwise provided in Code Section 42-8-63.1, the discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. It shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

> "Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties, except for registration requirements under the state sexual offender registry and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-62."

OPPOSITION BRIEF

No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
W. MANNING EVANS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Immigration and Nationality Act, a state crime is an "aggravated felony" if, *inter alia*, it is equivalent to a "felony punishable under the Controlled Substances Act." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under the Controlled Substances Act, possession of an unspecified quantity of marijuana with intent to distribute is a felony punishable by up to five years of imprisonment. 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010). If, however, the defendant shows that he distributed only "a small amount of marihuana for no remuneration," the offense is treated as a misdemeanor. 21 U.S.C. 841(b)(4), 844, 885(a)(1).

The question presented is whether, when a defendant is convicted in state court of possession of marijuana with intent to distribute and the record of conviction does not disclose the quantity of marijuana or the amount of remuneration (if any), the defendant has not been convicted of an aggravated felony merely because of the possibility that the offense might have involved "a small amount of marihuana for no remuneration."

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In the Supreme Court of the United States

No. 11-702

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 662 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 10a-13a) and the immigration judge (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. The petition for a writ of certiorari was filed on December 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, aliens who have been admitted to the United States are removable if they have been convicted of, among other offenses, one defined to be an

"aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Certain removable aliens may seek the discretionary relief of cancellation of removal, 8 U.S.C. 1229b(a), but an alien convicted of an "aggravated felony" is ineligible for that relief, 8 U.S.C. 1229b(a)(3).

As relevant here, an aggravated felony includes "illicit trafficking in a controlled substance * * * , including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense was "in violation of Federal or State law," 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act" (CSA), 21 U.S.C. 801 *et seq.* For these purposes, a "felony" is a crime punishable by more than one year of imprisonment. 18 U.S.C. 3559(a)(1)-(5); see 21 U.S.C. 802(13).

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits possession of a controlled substance with intent to distribute. Penalties for violating this CSA provision vary based on the type and amount of the controlled substance involved, as well as other factors. See generally 21 U.S.C. 841(b)(1)(A)-(E) (2006 & Supp. IV 2010). If the controlled substance is marijuana and weighs "less than 50 kilograms," the maximum penalty is five years of imprisonment, "except as provided in paragraph[] (4) * * * of this subsection." 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010). Paragraph (4), in turn, provides that "any person * * * distributing a small amount of marihuana for no remuneration shall be treated as provided in" 21 U.S.C. 844 and another statute not relevant here. 21 U.S.C. 841(b)(4). Section 844 prohibits the simple possession of controlled substances. The maximum term of incarceration under Section 844

for simple possession of marijuana is one year, but longer sentences are possible for recidivists when the government follows certain procedures. See 21 U.S.C. 844(a) (Supp. IV 2010), 851.

2. Petitioner is a native and citizen of Jamaica. In 1984, he was admitted to the United States as a lawful permanent resident. Pet. App. 2a, 11a.

In 2008, petitioner pleaded guilty in Georgia state court to one count of possession of marijuana with intent to distribute. Pet. App. 2a-3a, 11a; Administrative Record (A.R.) 83-84; Ga. Code. Ann. § 16-13-30(j) (2011). He was sentenced to five years of probation. Pet. App. 2a.[1]

In 2010, based on that conviction, the Department of Homeland Security (DHS) charged petitioner as an alien removable on two grounds: having been convicted of (1) an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii), and (2) a controlled substance offense, 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 2a, 15a. Petitioner admitted DHS's factual allegations but disputed whether they made him removable as charged. *Id.* at 16a.

After DHS produced certain conviction documents, the Immigration Judge (IJ) ruled that petitioner was removable as charged. Pet. App. 2a-3a, 18a. In particu-

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[1] Petitioner's sentence was imposed under Ga. Code Ann. § 42-8-60 *et seq.*, which concerns certain first offenders. A.R. 84. Dispositions under that procedure remain convictions for purposes of federal immigration law, however, under a provision added to the INA in 1996. A judgment is a "conviction" even where "adjudication of guilt has been withheld," if (as relevant here) "the alien has entered a plea of guilty" and "the judge has ordered some form of punishment * * * to be imposed." 8 U.S.C. 1101(a)(48)(A). Thus, "the mere fact that [an alien] was sentenced pursuant to Georgia's First Offender Act does not mean that he lacks a 'conviction' for purposes of the INA." *Ali* v. *United States Att'y Gen.*, 443 F.3d 804, 809-810 (11th Cir. 2006).

lar, the IJ cited *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), in holding that petitioner's conviction was an aggravated felony. Pet. App. 18a. During proceedings to determine whether petitioner was removable, petitioner did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration; during the earlier, distinct proceeding concerning bond, petitioner apparently submitted a document purporting to establish drug quantity, but not the absence of remuneration.[2]

3. Petitioner appealed. He challenged the "aggravated felony" ground of removability, contending that he had established, during the bond proceedings before the IJ, that his Georgia conviction involved a small amount of marijuana; he did not address remuneration. See A.R. 24-25.

4. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 10a-13a.

The Board explained that "[a] state offense constitutes a felony punishable under the [CSA]," and therefore an aggravated felony, "if it proscribes conduct punishable as a federal felony" under the CSA. Pet. App. 11a-12a (citing *Lopez* v. *Gonzales*, 549 U.S. 47 (2006)). In this case, the Board held, petitioner's Georgia offense of possession with intent to distribute marijuana was "analogous to the federal offense of possession of marihuana with intent to distribute," a felony. *Id.* at 12a.

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[2] The IJ's bond decision did not mention the document. See A.R. 66. Petitioner did not offer or cite the document in the proceedings to determine his removability until he filed it with the Board of Immigration Appeals. A.R. 37. The amount of marijuana involved in petitioner's Georgia conviction was never established during the proceedings before the IJ.

The Board rejected petitioner's argument that his Georgia offense should not be considered an "aggravated felony" because the elements of the offense encompassed some conduct that, in federal court, might have been punished under the misdemeanor sentencing provision of 21 U.S.C. 841(b)(4). Pet. App. 12a-13a. The Board had already considered and rejected that argument in its controlling decision in *In re Aruna*, *supra*. Pet. App. 13a.[3]

5. The court of appeals denied a petition for review. Pet. App. 1a-9a.

At the outset of its analysis, the court of appeals stated that it "uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA" and, specifically, "whether the elements of the state statute are analogous to a federal felony." Pet. App. 5a. Possession of a controlled substance with intent to distribute is a felony under the CSA, *id.* at 6a, and the court of appeals concluded that the analysis does not change in marijuana cases based on the mitigating exception in 21 U.S.C. 841(b)(4). The court of appeals noted that under its precedent in sentencing cases, when the controlled substance is marijuana but there is no evidence of drug quantity, the offense is a felony with a maximum term of five years of imprisonment, not a misdemeanor with a maximum term of one year. Pet. App. 7a-8a (citing 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010)). Only when the *defendant* carries the burden of demonstrating that he possessed only a small amount of marijuana for no remuneration does the mitigating exception

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[3] The Board stated that the precedential decision in *Aruna* eliminated any possible obligation to follow the court of appeals' previous *non*-precedential decision on this subject. Pet. App. 12a-13a (declining to follow *Jordan* v. *Gonzales*, 204 Fed. Appx. 425 (5th Cir. 2006)).

apply, the court of appeals concluded. *Id.* at 8a. Because petitioner did not carry that burden here, *id.* at 9a & n.4, the court of appeals sustained the finding that he was removable as an aggravated felon. *Id.* at 9a. The court thus joined the majority of other circuits in concluding that, in marijuana cases, evidence of drug quantity is not necessary for a state conviction for possession with intent to distribute to be treated as a "felony punishable under the [CSA]." See *id.* at 6a-7a.

ARGUMENT

The court of appeals correctly sustained the decision of the Board of Immigration Appeals in this case. Although there is some disagreement in the courts of appeals concerning the question presented, there is not a mature conflict warranting this Court's review. In particular, recent decisions of both this Court and the Board may prompt the two courts of appeals that have applied a different rule to re-examine their approach. This case does not warrant further review.

1. a. The relevant question here is whether petitioner's Georgia offense is a "felony punishable under the [CSA]." 18 U.S.C. 924(c)(2). A state crime is a "felony" for these purposes (whether or not it is classified as a felony under state law) if it is equivalent to an offense under the CSA that is punishable by more than a year of imprisonment. *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2582 (2010); *Lopez* v. *Gonzales*, 549 U.S. 47, 56 & n.7, 60 (2006).

The Board and this Court have used a "categorical approach" to resolve whether a particular state controlled-substance offense is an aggravated felony. *In re Aruna*, 24 I. & N. Dec. 452, 456 (B.I.A. 2008); *Carachuri-Rosendo*, 130 S. Ct. at 2586-2587 & n.11,

2588; see also Pet. 8-9. The "categorical approach" refers to the practice of looking only at the elements of the offense of conviction itself, rather than at the particular facts of the crime that led to the conviction. See *Aruna*, 24 I. & N. Dec. at 456; *Kawashima* v. *Holder*, No. 10-577 (Feb. 21, 2012), slip op. 4; *Carachuri-Rosendo*, 130 S. Ct. at 2586-2587.[4] In the context of controlled-substance offenses, applying the categorical approach requires the IJ to examine the elements of the state offense and determine whether, if a trier of fact found all of those elements satisfied, it necessarily also found that the defendant committed the elements of a felony offense under the CSA (which for these purposes is equivalent to the "generic offense" that is at issue in other contexts in which the categorical approach applies). See *Aruna*, 24 I. & N. Dec. at 456.

Possession of marijuana with intent to distribute is a felony under the CSA because it is punishable by imprisonment for more than one year. See pp. 2-3, *supra*; *Carachuri-Rosendo*, 130 S. Ct. at 2581. The elements of that offense are met if the defendant knowingly possesses marijuana with intent to distribute it.[5] The elements of petitioner's Georgia offense correspond to the federal offense. Pet. App. 12a-13a, 18a; see also *Hardeman* v. *State*, 453 S.E.2d 775, 775-776 (Ga. Ct. App.

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[4] Where a conviction does not *categorically* qualify as an aggravated felony, further analysis under the "modified categorical approach" is appropriate to determine (from a limited set of documents) whether the particular defendant was convicted of conduct that qualifies as an aggravated felony. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007); see also *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2299 (2009).

[5] Any quantity of marijuana suffices to establish the felony, although quantities greater than 50 kilograms trigger greater penalties. 21 U.S.C. 841(b)(1)(A)(vii) and (B)(vii).

1995) (referring to elements of state offense as possession and specific intent to distribute). Thus, petitioner was convicted of all the elements necessary to establish a felony offense under the CSA.

Petitioner contends (Pet. 10-14), however, that the foregoing analysis is incomplete, and that the relevant comparison must also take into account 21 U.S.C. 841(b)(4), which allows a defendant to have his offense treated as a simple-possession misdemeanor if he shows that he distributed only a small amount of marijuana for no remuneration. Petitioner is mistaken. Section 841(b)(4) is not relevant to the question whether, under the categorical approach, a state offense is "punishable under the [CSA]" as a felony.

A criminal offense is defined by its statutory "elements," which consist of the facts that, absent a valid waiver, must be proved to a jury beyond a reasonable doubt to convict a defendant of the offense. See *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989); *In re Winship*, 397 U.S. 358, 364 (1970); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477-478, 490 (2000). Cases that apply the "categorical approach" to sentencing-enhancement or aggravated-felony classifications emphasize that it generally focuses on the "elements" of offenses. See *Kawashima*, slip op. 4; *James* v. *United States*, 550 U.S. 192, 202, 214 (2007); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007); *Shepard* v. *United States*, 544 U.S. 13, 19 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990).[6] This focus minimizes the "practical difficulties and potential unfairness of a factual approach" in which the events underlying a

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[6] Compare *Nijhawan*, 129 S. Ct. at 2300-2303.

conviction would be relitigated in a subsequent proceeding. *Taylor*, 495 U.S. at 601-602.

Section 841(b)(4) is irrelevant in using a "categorical approach" to identify state convictions that constitute CSA felonies. That paragraph does not define any element of any crime, and the CSA authorizes a felony sentence without regard to that paragraph. Rather, the CSA felony is possession of marijuana with intent to distribute. See 21 U.S.C. 841(b)(4) (referring to "any person who violates subsection (a) of this section"). And the maximum penalty for violations of Subsection (a) involving an unspecified amount of marijuana is five years, as set forth in 21 U.S.C. 841(b)(1)(D). Section 841(b)(4) is only a "mitigating exception" to those otherwise-applicable sentencing provisions. *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.); see also 21 U.S.C. 885(a)(1) (providing that "[i]t shall not be necessary for the United States to negative any exemption or exception set forth in [the CSA]").

For that reason, every court of appeals to have considered the question has held that for *Apprendi* purposes, the statutory maximum penalty for possession of an unspecified amount of marijuana with intent to distribute is five years (under Section 841(b)(1)(D)), not one year (under Section 841(b)(4)). *United States* v. *Hamlin*, 319 F.3d 666, 670-671 (4th Cir. 2003); *United States* v. *Campbell*, 317 F.3d 597, 603 (6th Cir. 2003); *United States* v. *Walker*, 302 F.3d 322, 324 (5th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1222 (2003); *Outen*, 286 F.3d at 638-639; see also *United States* v. *Eddy*, 523 F.3d 1268, 1271 (10th Cir. 2008) (Section 841(b)(4) does not create a lesser included offense of Section 841(b)(1)(D)); *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 53 (1st Cir.) (endorsing

Outen's analysis in the context of another statute with a mitigating exception), cert. denied, 543 U.S. 856 (2004).

If adopting a provision that lowered the otherwise-applicable maximum sentence for a subset of offenses were deemed to require the prosecution to negate that provision's applicability in every case, such a rule "would largely prohibit Congress from establishing facts in mitigation of punishment[;] * * * any attempt to do so would necessarily result in having to submit to the jury the question of the *negating* of these mitigating facts in order to support a punishment greater than that prescribed in the mitigating provision." *Campbell*, 317 F.3d at 603 (quoting *Outen*, 286 F.3d at 638). In short, there is no requirement that the trier of fact rule out the considerations of a "small amount of marihuana" and "no remuneration," to which Section 841(b)(4) refers, before a defendant can be convicted of marijuana distribution-related offenses under 21 U.S.C. 841(a)(1) and be subject to felony punishment under 21 U.S.C. 841(b)(1)(D). See *Outen*, 286 F.3d at 638. See generally *Apprendi*, 530 U.S. at 491 n.16 (referring to "the defendant * * * showing" facts in mitigation of punishment).

Thus, under the CSA, a jury can convict a defendant of the crime of possession of marijuana with intent to distribute, without needing to find beyond a reasonable doubt that the amount was "not small" or that there was remuneration. Likewise, a court can accept a plea of guilty to possession of marijuana with intent to distribute, without needing to find a factual basis to conclude that the amount was "not small" or that there was remuneration. And the mere absence of evidence on those points does not cap the defendant's sentence at one year. See *Hamlin*, 319 F.3d at 670-671; *Campbell*, 317 F.3d at 601-603; *United States* v. *Bartholomew*, 310 F.3d 912,

925 (6th Cir. 2002), cert. denied, 537 U.S. 1177 (2003); *Walker*, 302 F.3d at 323-324; *Outen*, 286 F.3d at 625-626, 635-636, 639. Rather, to invoke the one-year maximum, the defendant himself must affirmatively establish that the mitigating exception applies.

Under these circumstances, when the record of a state conviction for possession with intent to distribute marijuana is silent as to drug quantity, the proper federal analogue is a conviction subject to the five-year maximum sentence under Section 841(b)(1)(D). That is a "felony punishable under the [CSA]" and, therefore, an aggravated felony.

b. Petitioner asserts (Pet. 12-13) that the court of appeals' decision is contrary to this Court's holding in *Carachuri-Rosendo*. That contention lacks merit.

The Court in *Carachuri-Rosendo* considered a state offense whose elements were punishable in *two* ways under the CSA, one a misdemeanor (simple possession) and one a felony (recidivist possession). The elements of simple and recidivist possession are identical because recidivism is not an element found by the jury beyond a reasonable doubt, see 130 S. Ct. at 2581 n.3, and the question in *Carachuri-Rosendo* was how to determine whether a state defendant would have been "punishable" as a recidivist, and thus a felon, under the CSA. The Court held that when a defendant is convicted of simple possession in state court, but evidence outside the record of conviction could establish that he is a recidivist, his state-law crime nonetheless is analogous to the federal offense of simple possession, not recidivist possession. *Id.* at 2586-2589. The Court did not announce a rule that, as petitioner would have it, "in the immigration context[] the question under the categorical approach is not whether the elements of a state offense

match the elements of a federal offense, but rather whether the conduct underlying the state law conviction, as revealed in the record of conviction, is necessarily punishable as a felony." Pet. 13. Nothing in *Carachuri-Rosendo* heralded such a dramatic change in focus, from the elements of an offense to the non-element "underlying" "conduct" of an offense. Indeed, this Court has confirmed since *Carachuri-Rosendo* that the focus in an ordinary categorical-approach case is on the elements of the offense. *Kawashima*, slip op. 4.

Rather, recidivism is unique in that it can change the maximum punishment for an offense *without* being either an element, see 130 S. Ct. at 2581 n.3, or even (as petitioner would have it) "conduct underlying the state law conviction." Pet. 13. Recidivism factors therefore demanded a further refinement of the analysis. When a state conviction actually invokes a recidivism factor, the federal analogue is the felony offense of recidivist possession rather than the misdemeanor offense of simple possession, even if (as *Apprendi* permits) the fact of a prior conviction is not formally made an element. See *Lopez*, 549 U.S. at 55 n.6 ("Those state possession crimes that correspond to * * * recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)"); *Carachuri-Rosendo*, 130 S. Ct. at 2585 n.10, 2587 n.12; cf. *United States* v. *Rodriquez*, 553 U.S. 377 (2008). *Carachuri-Rosendo* held that when a recidivism enhancement was potentially available in the underlying criminal prosecution, but was not actually applied, the correct analogy is to misdemeanor possession, not recidivist possession. 130 S. Ct. at 2586-2587. Thus, the Court focused in *Carachuri-Rosendo* on the state prosecutor's charging decision, not (as petitioner

suggests) on the underlying facts; it was uncontested that Carachuri-Rosendo did, in fact, have a prior drug-possession conviction. *Id.* at 2580.

The holding of the court of appeals is fully consistent with the Court's analysis. The Court held in *Carachuri-Rosendo* that a defendant is "punishable" as a felon under the CSA only if the prosecutor takes all the requisite steps to trigger a statutory maximum sentence in excess of one year; in the case of recidivist possession, those steps under the CSA include filing a criminal information alleging any prior convictions. 130 S. Ct. at 2587-2588; see 21 U.S.C. 844(a) (Supp. IV 2010), 851. Here, all the facts necessary to subject petitioner to a five-year sentence were established by his Georgia conviction: he knowingly possessed marijuana with intent to distribute it. See 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010).[7] No other fact had to be proved; the government was under no obligation to prove either quantity or remuneration. 21 U.S.C. 885(a)(1). If petitioner had been charged in federal court, he could not have invoked the one-year statutory maximum unless he carried the burden of showing that his offense involved only a small amount of marijuana and no remuneration; he has never attempted in these immigration proceedings to show the latter, as he admits, and his attempt to show the former was untimely. Pet. 6 n.1; Pet. App. 9a n.4; see note 2, *supra*. *Carachuri-Rosendo* thus bolsters the point that petitioner was "punishable" as a felon under the CSA.

2. Since the filing of the petition for a writ of certiorari, the Board has made clear that an alien can defeat an aggravated-felony finding if he carries his burden to

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[7] Petitioner's insistence that *Carachuri-Rosendo* emphasized "the record of conviction" (Pet. 12-13) therefore is beside the point here.

prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration. That decision definitively eliminates one of the conflicts petitioner asserts (which was illusory in any event) and refutes petitioner's notion that the decision below would lead to absurd results.

In *In re Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012), the alien had previously been convicted of an offense whose elements included possessing less than half an ounce of marijuana. The alien testified in immigration court that he had bought the marijuana at a party. The IJ therefore found that the alien had possessed only a small amount of marijuana for no remuneration. *Id.* at 699. The Board agreed that the alien could defeat the aggravated-felony finding by making such a showing, and that he could do so "by any probative evidence," including his own testimony. *Id.* at 702. The Board remanded for further factfinding on the circumstances of the particular case, *i.e.*, whether the alien had in fact intended to distribute the marijuana for remuneration. *Id.* at 704.[8]

The Board's decision in *Castro-Rodriguez* refutes petitioner's assertion (Pet. 17-19) that the courts of appeals are in conflict over whether an alien can ever seek to prove that his offense involved only a small amount of

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[8] Accord *In re Dudley*, No. A043-092-703, 2011 WL 899580 (B.I.A. Feb. 14, 2011) (unpublished) (citing *Aruna* for the proposition that an alien "may attempt to prove in Immigration Court that he or she is not an aggravated felon * * * because the underlying drug trafficking offense involved possession of a 'small amount of marijuana for no remuneration'"); *Aruna*, 24 I. & N. Dec. at 458 n.5 (stating that the alien had made "no effort * * * to prove that the quantity of marijuana in his offense was 'small' or that his offense involved a conspiracy to distribute marijuana for no remuneration")

marijuana for no remuneration. The Board has now squarely held that he can. And the only decision that petitioner cites to the contrary, *Garcia* v. *Holder*, 638 F.3d 511 (6th Cir. 2011), petition for cert. pending, No. 11-79 (filed July 18, 2011), does not in fact hold that an alien cannot. In *Garcia*, the alien did not seek to establish either that his offense had involved a small amount of marijuana or that he had not intended to seek remuneration. See Gov't Br. in Opp. at 5-6 nn.3-4, *Garcia*, *supra* (No. 11-79). The Sixth Circuit merely stated that the actual amount of marijuana involved in Garcia's offense was "unknown," and that Garcia could not defeat aggravated-felon status through the mere "assum[ption] that the conduct underlying his state conviction was the minimum criminal conduct necessary to sustain the conviction." 638 F.3d at 516, 518. Thus, the Sixth Circuit did not purport to decide in any binding way what would happen if an alien *did* prove that his offense involved only a small amount of marijuana for no remuneration, or how he could prove it. Accord *Julce* v. *Mukasey*, 530 F.3d 30, 36 (1st Cir. 2008) (leaving this issue open and suggesting that the Board may wish to address it). Especially in light of the Board's subsequent decision making clear that aliens with prior convictions like petitioner's and Garcia's have an open pathway to prove quantity and absence of remuneration, there is no reason to read the Sixth Circuit as having prematurely blocked that path.[9]

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[9] Petitioner is poorly situated in any event to litigate the question whether an alien may establish entitlement to relief under Section 841(b)(4) if he carries his burden, because petitioner never attempted to show that he possessed marijuana for no remuneration and did not timely attempt to prove the quantity involved in his offense. For that

The Board's decision in *Castro-Rodriguez* also refutes petitioner's assertion (Pet. 13-14, 18) that the position of the Board and the court of appeals would unfairly insist on treating an alien as an aggravated felon even if he could definitively prove that, as a factual matter, he possessed only a small amount of marijuana for no remuneration. The Board has now made clear that no such consequence will result. Rather, it is petitioner's position that would lead to that sort of perplexing result. Even if the government could prove that an alien sold substantial quantities of marijuana for profit, under petitioner's position that alien would still escape aggravated-felon treatment, unless (on petitioner's apparent view, Pet. 9, 11 n.2) the government could prove quantity or remuneration using portions of the record of conviction that are permissible under the modified categorical approach. See note 4, *supra*.

3. On the question whether petitioner's offense is properly regarded as a "felony punishable under the [CSA]," petitioner overstates the degree of disagreement among the courts of appeals. Pet. 14-19. Although two circuits previously reached a different conclusion, those courts may reach a different result with the benefit of the court of appeals' decision in this case, the Sixth Circuit's *Garcia* decision, and the Board's decisions in *Aruna* and *Castro-Rodriguez*. Furthermore, the only courts that have considered the question in precedential decisions with the benefit of the recent decision in *Carachuri-Rosendo*—the court below and the Sixth Circuit—have rejected petitioner's position. As noted above, *Carachuri-Rosendo* provides further support for

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reason, the court of appeals expressly declined to address that question in this case. Pet. App. 9a n.4.

the decision below. But even if petitioner were correct that it supports his position instead, it would be premature for this Court to grant review of only the second precedential decision to address the issue with the benefit of the decision in *Carachuri-Rosendo*.

Petitioner acknowledges that the First and Sixth Circuits have reached the same conclusion as the court below. *Julce*, 530 F.3d at 33-35; *Garcia*, 638 F.3d at 515-518. The Fourth Circuit has made the same determination in a criminal context, by holding that notwithstanding Section 841(b)(4)'s mitigating exception, possession of an unspecified amount of marijuana with intent to distribute is a "drug trafficking crime" under 18 U.S.C. 924(c)(2) (the same statutory definition that the INA borrows in its definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(B)). *Hamlin*, 319 F.3d at 670-671.

Petitioner cites two precedential decisions reaching the opposite conclusion. The Second Circuit, in *Martinez* v. *Mukasey*, 551 F.3d 113 (2008), recited but misapplied the principle that "the sole ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* at 121. Here, the "minimum criminal conduct" sufficient to obtain a conviction under Georgia law also suffices to obtain a felony conviction under the CSA; the offense is punished as a felony under the CSA unless the defendant affirmatively proves both smallness of quantity and lack of remuneration. The Third Circuit has offered even less reasoning for its conclusion; its cases trace back to an earlier decision in which the state statute itself appeared to incorporate "no remuneration" and "small amount" findings, which does not by its terms address whether the government must negate the possi-

bility of such findings. See *Steele* v. *Blackman*, 236 F.3d 130, 137 (2001). The Third Circuit then cited *Steele* for the proposition that a state statute prohibiting possession of marijuana with intent to distribute does not qualify as a felony CSA offense unless the state statute "contain[s] sale for remuneration as an element." *Wilson* v. *Ashcroft*, 350 F.3d 377, 381 (2003). The Third Circuit has applied the same no-element reasoning, *Jeune* v. *Attorney Gen. of the U.S.*, 476 F.3d 199, 205 (2007), although it has since acknowledged that a conviction constitutes an aggravated felony if the record of conviction includes evidence that the drug quantity exceeded a small amount. See *Catwell* v. *Attorney Gen. of the U.S.*, 623 F.3d 199, 207 (3d Cir. 2010).[10]

Contrary to petitioner's submission (Pet. 15), the issue can recur in those two circuits in ways that would allow those circuits to re-examine this issue in light of subsequent developments. For instance, the Board decided *Catwell* well after the Third Circuit's decision in *Jeune*, see 623 F.3d at 205; the issue was presented there because there was an antecedent question about whether a particular amount was small enough. See also *Thomas* v. *Attorney Gen. of the U.S.*, 625 F.3d 134, 148 (3d Cir. 2010) (antecedent question about sufficiency of alien's admission that he sold marijuana). The issue also recurs in direct criminal appeals. See, *e.g.*, *Outen*, 286

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[10] In addition to discussing Second and Third Circuit cases, petitioner also cites (Pet. 16) an unpublished Ninth Circuit decision, *Dias* v. *Holder*, No. 08-73051, 2011 WL 4431099 (Sept. 23, 2011). The *Dias* decision, however, conflicts with the Ninth Circuit's general rule that affirmative defenses are not relevant to the categorical approach. See *Gil* v. *Holder*, 651 F.3d 1000, 1005-1006 (2011). It would be premature to treat that non-precedential disposition as relevant to whether there is a circuit conflict warranting this Court's review. Cf. Pet. App. 8a.

F.3d at 637. Thus, the government has ongoing opportunities to brief the question in the Second and Third Circuits.

There is reason to think those circuits may take up the opportunity to reconsider their mistaken divergence from the categorical approach. The original circuit precedents predate the Board's decisions in *Aruna* and *Castro-Rodriguez*, which set out the proper procedure for applying the "small amount" mitigating exception when deciding whether a state crime is a "felony punishable under the [CSA]." And to the government's knowledge, no petition for rehearing en banc raising the issue has been filed in either the Second or Third Circuit. Indeed, the Third Circuit noted in one post-*Aruna* case that the government had not requested that the court revisit its pre-*Aruna* precedent in light of the Board's decision. *Evanson* v. *Attorney Gen. of the U.S.*, 550 F.3d 284, 289 (2008). The government will now have the opportunity to do so.

Furthermore, this Court's reasoning in *Carachuri-Rosendo* lends additional support to the decision below. *Carachuri-Rosendo* emphasized the relevance of the procedural "prerequisites" to felony punishment for recidivist possessors under 21 U.S.C. 851 when determining under a "categorical inquiry" whether a possession conviction constituted a "drug trafficking" aggravated felony. 130 S. Ct. at 2588; see also *id.* at 2582. By contrast, Section 841(b)(4) imposes no such "prerequisites" on the government before the government can seek felony punishment of marijuana distributors. (Section 855(a)(1) eliminates any possible ambiguity on that point.)

Reconsideration at the circuit level would thus be in order given the combination of supportive reasoning

from this Court, recent on-point decisions from the Board and from two other circuits (in this case and in *Garcia*), and support in circuit law for the proposition that a defendant can be convicted of felony possession with intent to distribute marijuana without any proof of drug quantity or remuneration. *E.g.*, *Outen*, 286 F.3d at 638. Review by this Court would accordingly be premature at this point.[11]

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[11] Petitioner was charged with being removable based on both an aggravated felony and a controlled substance offense. See p. 3, *supra*. Although the IJ did not discuss the latter in his written decision, see Pet. App. 18a, petitioner has never disputed that his conviction for possession of marijuana with intent to distribute is for "a violation of * * * any law or regulation of a State * * * relating to a controlled substance." 8 U.S.C. 1227(a)(2)(B)(i); see A.R. 68, 72-76. Because petitioner's offense contained the element of intent to distribute, the offense does not qualify for the exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i); see A.R. 81. Thus, petitioner remains removable regardless of whether his Georgia conviction is an "aggravated felony." Accordingly, even if petitioner's conviction were found not to be an aggravated felony, his only basis for avoiding removal would be to seek and obtain cancellation of removal under 8 U.S.C. 1229b(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
W. MANNING EVANS
Attorneys

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REPLY BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that this petition is an ideal vehicle to resolve the recurring circuit conflict over whether a state marijuana offense that encompasses conduct that would be a federal law misdemeanor is nonetheless automatically an "aggravated felony" under the immigration laws. The government's suggestion that the conflict may resolve itself without this Court's intervention lacks the slightest merit. Certiorari accordingly should be granted.

1. The Solicitor General frankly acknowledges the three-to-two circuit conflict over the question presented. *See* BIO 16-17. The First, Fifth, and Sixth Circuits – along with the BIA – hold that such an offense is a felony; each has recognized the conflict. *See* Pet. App. 8a; *Garcia v. Holder*, 638 F.3d 511, 518 (6th Cir. 2011), *pet. for cert. pending*, No. 11-79 (filed July 18, 2011); *Julce v. Mukasey*, 530 F.3d 30, 35 & n.6 (1st Cir. 2008); *In re Aruna*, 24 I. & N. Dec. 452, 455-57 & n.4 (B.I.A. 2008). The Second and Third Circuits hold that the offense is a misdemeanor; the latter has recognized the split. *See, e.g., Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008); *Evanson v. Attorney Gen.*, 550 F.3d 284, 289 (3d Cir. 2008).

That conflict is intolerable, given Congress's determination that "the immigration laws of the United States" should be "uniform[]." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384. The results here are uniquely arbitrary. The BIA decides indistinguishable cases based on the happenstance of

where the alien lived or was moved and detained by the government when it initiated deportation. *Compare, e.g.*, *In re Velez-Vargas*, No. A092-991-943, 2011 WL 3665687, at *1 (B.I.A. Aug. 5, 2011) (alien in Louisiana committed aggravated felony) *with In re Johnson*, No. A089-013-402, 2011 WL 7071049, at *3 (B.I.A. Dec. 22, 2011) (holding just a few months later that alien in Connecticut had not). And despite the Sixth Circuit's holding that a Michigan offense is an aggravated felony, *Garcia*, 638 F.3d at 518, an alien convicted under Ohio's statute prevailed because he happened to be in New York, *In re Massaquoi*, No. A029-723-049, 2009 WL 1800120, at *1 (B.I.A. June 10, 2009).

But it gets worse. Aliens convicted for the *identical* offense under the *same* state law are subject to conflicting rules. For example, the courts and the BIA have recently considered the cases of six aliens convicted under New York's marijuana statute, N.Y. Penal Law § 221.40. But the government routinely moves aliens detained in the Northeast to facilities in the South. So three aliens who remained within the jurisdiction of the Second Circuit, as well as one within the Third Circuit, prevailed. *Wright v. Attorney Gen.*, 376 Fed. Appx. 190, 193-94 (3d Cir. 2010); *Martinez*, 551 F.3d at 122; *Beckford v. Filip*, 308 Fed. Appx. 556, 557-58 (2d Cir. 2009); *In re Taylor*, No. A079-110-293, 2010 WL 2601509, at *1 (B.I.A. June 8, 2010). The two others lost because they happened to be in Louisiana and Texas. *In re Mascoll*, No. A072-748-004, 2010 WL 4972424, at *1 (B.I.A. Nov. 12, 2010); *In re Bastardo*, No. A042 889 306, 2008 WL 4146726, at *1 n.1 (B.I.A. Aug. 20, 2008), *vacated on other grounds*, *Bastardo v. Holder*,

384 Fed. Appx. 383 (5th Cir. 2010). Those were all cases decided on appeal; no doubt, many more have been subject to the same disparate treatment by immigration judges. That inconsistency is completely unacceptable.

The petition furthermore demonstrated the vital importance of the question presented. *See* Pet. 19-20. A massive number of individuals have been convicted for marijuana offenses, and such drug crimes are the principal basis invoked by the government in deportation proceedings. The Solicitor General does not dispute that the question determines the fate of hundreds of aliens every single year.

The issue has dramatic implications. It determines not only whether the individual may be eligible for discretionary cancellation of removal, *see* 8 U.S.C. § 1229b(a)(3), but whether he will be barred from seeking readmission, *id.* § 1182(a)(9)(A)(ii), from requesting asylum, *id.* §§ 1158(b)(2)(A)(ii), (B)(i), and from being naturalized, *id.* § 1101(f)(8); 8 C.F.R. § 316.2(a)(7).[1]

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[1] Thus, while the government notes that petitioner (like the alien in every case presenting this question) is also removable on the ground that his offense involved a controlled substance, *see* BIO 20 n.11, the issue has great significance, because it determines whether he can avoid deportation. That is why the question arises so often before the BIA and the courts of appeals. The government correctly does not suggest either that the question would never warrant review or that this particular case is an inappropriate vehicle to decide the question. *See also, e.g., Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2580, 2589 (2010) (review granted in identical posture under the same statutory scheme).

Individuals convicted of minor marijuana offenses, who often have lawfully lived in this country for decades, thus may be forever ripped from their loved ones. They often are deported to nations in which they have no ongoing relationships, no jobs, and no family. Petitioner, for example, came to this country as a lawful permanent resident twenty-eight years ago, at the age of *four*. He has two children here. Yet as an adult he has been forcibly removed to Jamaica, entirely because of the happenstance that the government did not choose to detain him within the Second or Third Circuit.

2. There is no merit to the suggestion, BIO 19, that the Second and Third Circuits might reverse themselves. The Third Circuit has applied its rule in an uninterrupted line of *nine* decisions over the course of a decade, in panels composed of eleven of that court's thirteen active judges, without any judge ever suggesting that the question be reconsidered.[2]

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[2] In five cases, the court invalidated the aggravated felony determination. *Steele v. Blackman*, 236 F.3d 130, 138 (3d Cir. 2001) (McKee, Rendell, Stapleton, JJ.); *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3d Cir. 2003) (Alito, Ambro, Chertoff, JJ.); *Jeune v. Attorney Gen.*, 476 F.3d 199, 205 (3d Cir. 2007) (Smith, Roth, JJ.; Irenas, D.J.); *Evanson*, 550 F.3d at 293-94 (Sloviter, Fuentes, Aldisert, JJ.); *Wright*, 376 Fed. Appx. at 193-94 (Rendell, Fisher, Garth, JJ.). In four others, the Third Circuit held that the government had proven through appropriate evidence that the defendant's state offense corresponded to a federal felony. *Garcia v. Attorney Gen.*, 462 F.3d 287, 293 (3d Cir. 2006) (Fisher, Chagares, Reavley, JJ.); *Santos v. Attorney Gen.*, 352 Fed. Appx. 742, 744-45 (3d Cir. 2009) (Scirica, Jordan, Cowen, JJ.); *Catwell v. Attorney Gen.*, 623 F.3d 199, 207 (3d Cir. 2010) (Rendell, Jordan, Greenaway, JJ.); *Miller v. Attorney*

The government backhandedly disparages the Third Circuit's reasoning, BIO 17-18, but fails to acknowledge that the court has given this precise question extraordinary consideration. In its second decision on the question, the panel (Alito, Ambro, Chertoff, JJ.) directed the parties to submit special briefing on this question. Order of Sept. 4, 2003, *Wilson*, 350 F.3d 377 (No. 03-1414). The next panel to hear the question did the same. Order of Nov. 17, 2006, *Jeune*, 476 F.3d 199 (No. 05-3103). A third panel subsequently remanded its case to the BIA for additional consideration of the issue, then issued its decision in the alien's favor after the BIA's further ruling; the case took an extraordinary five years to decide. Order of Dec. 8, 2005, *Wright*, 376 Fed. Appx. 190 (No. 05-2536) (decided April 16, 2010). Each time, the Third Circuit adhered to its settled rule without any expression of doubt.

Nor is there any prospect that the Second Circuit will reverse itself. That court announced its rule after the circuit split developed and after the BIA decided *In re Aruna*. *See Martinez*, 551 F.3d 113. Like the Third Circuit, the court gave the question detailed consideration, remanding the case to the BIA for further consideration of this issue; after the BIA adhered to its position, the court of appeals reversed. *See id.* at 117, 122. Subsequently, another panel unhesitatingly applied the court's precedent to reverse an order of deportation. *Beckford*, 308 Fed. Appx. at 557-58 (Miner, Sotomayor, Katzmann, JJ.).

Gen., 439 Fed. Appx. 172, 175-76 (3d Cir. 2011) (Fuentes, Greenaway, Greenberg, JJ.).

No less important, the Second Circuit leaves the resolution of inter-circuit conflicts like this one to this Court. Its en banc practice is almost entirely limited to resolving intra-circuit disagreements. *See generally* Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355, 357-65 (1989). Here, there is no realistic prospect of en banc review, because the Second Circuit's precedent is uniform.

The United States unduly minimizes the significant limitations on the opportunities for this question to ever give rise to en banc review in either court. Now that the precedent of the Second and Third Circuits is firmly settled, the BIA has completely given up on contesting it, while in every other case it continues to firmly adhere to the rule applied by the Fifth Circuit. *See* Pet. 15-17. But in any event, the Solicitor General's argument is belied by the government's litigating practice. While this question was being actively litigated in the Second and Third Circuits, the government lost on this precise issue in seven different cases. Four (two in each court) post-date both the circuit conflict and the published BIA ruling on which the United States relies. Yet the government has *never* sought rehearing en banc in *either* court. In fact, it seems conspicuously to have avoided making such a request. Even now, the Solicitor General – who must approve every such petition – pointedly declines to say any more than that the government "ha[s] the opportunity to" make such a request. BIO 19. Conspicuously missing is any representation that if it ever gets the chance it "will" do so.

3. Nothing has happened that would cause either the Second or Third Circuit to reconsider its well-settled position. The government does not seriously argue otherwise. The fact that the BIA issued its precedential decision in *Aruna* after "[t]he *original* circuit precedents" of those courts, BIO 19 (emphasis added), has no significance for several reasons: federal appellate courts review the BIA, not the other way around; neither circuit affords any deference to the BIA on such a question[3] (and no circuit has ever deferred to *Aruna* in particular); *Aruna* contains no argument or authority that the Second and Third Circuits have not considered; and (not surprisingly, given all that) both circuits have multiple *subsequent* circuit precedents – two in each court – firmly adhering to their position. The Department of Justice seemingly agrees that *Aruna* is a nonstarter since, when given the opportunity, "the government ha[s] *not* requested that the court revisit it pre-*Aruna* precedent in light of the Board's decision." *Id.* 19 (emphasis added).

The Board's more recent decision in *In re Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012), similarly would receive no deference. But in any event, *Castro-Rodriguez* simply confirms what *Aruna* had already suggested well before: that an alien may to try to

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[3] *See, e.g.*, *Almeida v. Holder*, 588 F.3d 778, 785 (2d Cir. 2009) ("we owe no deference to [the BIA's] decision that a particular crime, defined by state law, constitutes [an aggravated felony]"); *Singh v. Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006) (BIA's interpretations of state and federal criminal laws for purposes of aggravated felony determination are "not entitled to deference by this Court").

prove that his individual marijuana offense was not an aggravated felony through proof that is not admissible under this Court's precedents articulating the modified categorical approach. *See In re Aruna*, 24 I. & N. Dec. at 457 ("the defendant . . . bears the burden of proving the additional facts, i.e., the 'smallness' of the amount of marijuana and the absence of remuneration").

If anything, the BIA's ruling would only reinforce the Second and Third Circuits' conclusion that the government's position is insupportable. It cannot be squared with the government's unqualified position that the misdemeanor provision of "Section 841(b)(4) is *irrelevant* in using a 'categorical approach' to identify state convictions that constitute CSA felonies [because t]hat paragraph does not define any element of any crime, and the CSA authorizes a felony sentence without regard to that paragraph." BIO 9 (emphasis added). On that view, the alien can never negate the "aggravated felony" finding in an individual case; instead, even if an alien is convicted under state law for conduct that equates with a federal misdemeanor, he has committed an "aggravated felony." *Castro-Rodriguez* also cannot be reconciled with this Court's precedents strictly limiting the documents admissible under the "modified categorical approach"; the BIA's ruling instead invites precisely the mini-trials that this Court's decisions insist on avoiding. *See Shepard v. United States*, 544 U.S. 13, 23 (2005); *Taylor v. United States*, 495 U.S. 575, 601 (1990).

Finally, the government's suggestion that this Court's decision in *Carachuri-Rosendo* "lends additional support" to the position of the Fifth

Circuit, BIO 19, is insupportable. The proof is in the pudding: the government's brief on appeal twice *disclaimed* that decision as "inapplicable to the [present] case." Gov't C.A. Br. 9, 20. The suggestion that the Second and Third Circuits would reverse themselves on the basis of a decision the government says is "inapplicable" obviously lacks any merit.

In reality, *Carachuri-Rosendo* significantly reinforces the precedent of the Second and Third Circuits, as it rejects all three pillars of the government's argument. First, whereas the government asserts that every such marijuana offense is an aggravated felony because the only applicable "offense" is the felony defined by Section 841(a)(1), BIO 7-9, *Carachuri-Rosendo* holds that under the provision at issue here, Section 844(a), "a first-time simple possession offense is a federal misdemeanor." 130 S. Ct. at 2581; 21 U.S.C. § 841(b)(4) (distribution of "a small amount of marihuana for no remuneration shall be treated as provided in section 844"). Second, *Carachuri-Rosendo* concludes that the relevant immigration statutes' references to "aggravated felony" and "illicit trafficking" must be given their "everyday understanding," *id.* at 2585, which cannot fairly encompass possessing or sharing small amounts of marijuana for no remuneration. Third, this Court's decision specifically rejects the government's argument that any state offense that is "punishable" under the elements of Section 841(a)(1) is an "aggravated felony," BIO 8, 11, emphasizing that the INA instead applies only when the defendant has

actually been "*convicted* of a[n] aggravated felony." *Carachuri-Rosendo*, 130 S. Ct. at 2586-87.[4]

The Solicitor General's suggestion that the Second and Third Circuits would be persuaded by the government's arguments on the merits also fails to account for the significant points that the Brief in Opposition completely fails to address. *See* Pet. 8-14. Thus, even if one accepts the contestable premise that a defendant in the distinct context of a criminal drug case would have to prove that his marijuana offense was a misdemeanor, BIO 10-11, under the "categorical approach," the government is subject to the "demanding requirement" that it "make a showing that a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to" the federal felony. *Shepard*, 544 U.S. at 24 (plurality opinion). In *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010), the Court presumed that the defendant had engaged in the least culpable conduct under the state offense because "nothing in the record of [defendant]'s 2003 battery conviction

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[4] Thus, the government errs in arguing that only the "elements" of Section 841(a)(1) are relevant because decisions applying the "categorical approach" "generally focus[] on the 'elements' of offenses." BIO 8 (citing cases). Any such "general focus" cannot answer the question presented, because the "elements" of Section 841(a)(1) only describe an offense, not whether a particular "conviction" for that offense constitutes a felony or instead a misdemeanor. Under the modified categorical approach, the court assumes the defendant committed the least culpable conduct under the state charge, which here corresponds to a federal law misdemeanor. *See generally* Pet. 8-10.

permitted the District Court to conclude that it rested upon anything more than the least of these acts."

The government also does not dispute that Congress could not have intended the grossly unfair regime that its interpretation requires. Aliens charged in state court – as opposed to federal court under the CSA – often will have had no incentive to develop, introduce, and preserve evidence that their offenses involved small amounts of marijuana and no remuneration – facts that are irrelevant to the state charges. So the state record of conviction that is relevant under the modified categorical approach often will not reflect the facts that on the government's view are required to find the alien did not commit a felony. Similarly, the position of the United States compels an implausible discrimination between aliens charged in federal rather than state court. An alien convicted in federal court under Section 844(a) with possessing or sharing a small amount of marijuana for no remuneration commits only a misdemeanor. But an alien charged under state law for the *identical* conduct commits a federal "aggravated felony," for which he will be deported. *See* Pet. 14 n.3.

The government's remaining arguments on the merits do not otherwise require discussion. None is a point that that the Second and Third Circuits has not fully considered. Even if the United States were correct that those circuits misapply the governing statutes and this Court's precedents, that would only be a reason to grant certiorari and correct that recurring error.

In the two most analogous cases, this Court granted less compelling certiorari petitions. *Carachuri-Rosendo* involved a two-to-two circuit conflict that had existed only for a single year. *See generally* Brief for the U.S. (certiorari stage) at 14, *Carachuri-Rosendo*, 130 S. Ct. 2577 (No. 09-60). *Lopez v. Gonzales* involved a three-to-one conflict that had existed for four years. *See generally* Brief for the U.S. (certiorari stage) at 7, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (No. 05-547). As in both those cases, this petition should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

March 13, 2012

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

A non-citizen "convicted" of a "felony punishable under the Controlled Substances Act" (CSA) is subject to mandatory deportation. Under the CSA, some convictions for the distribution of marijuana are punishable as felonies; others are instead merely misdemeanors.

The "categorical approach" determines whether a drug conviction is a felony punishable under the CSA. The relevant question is whether the conviction itself "necessarily" corresponds to the federal felony. The facts of the offense are irrelevant.

The Question Presented is:

Did the Fifth Circuit err in holding that every conviction for marijuana distribution is a felony that triggers mandatory deportation unless immigration authorities find, based on facts outside the conviction, that the offense corresponds to the misdemeanor?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies all the parties to the proceedings below.

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American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf 36

Black's Law Dictionary (9th ed. 2009) 22

Das, Alina, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669 (2011) 17

Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States* (2011), *available at* http://www.hrw.org/reports/2011/06/14/costly-move-0 36

Lutheran Immigration & Refugee Service & Women's Commission for Refugee Women and Children, *Locking Up Family Values: The Detention of Immigrant Families* (2007), *available at* http://www.womensrefugeecommission.org/docs/famdeten.pdf 36

National Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CF4QFjAA&url=http%3A%2F%2Fwww.nilc.org%2Fdocument.html%3Fid%3D9&ei=1qPkT-bNMvO20QHhu-zXCQ&usg=AFQjCNFDn13giJU8EDMhc2Vcjl5auZLGgg&sig2=8dzDINa8E78F8siS2i9ekw 36

Seattle University School of Law, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* (2008), *available at* http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf 36

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BRIEF FOR THE PETITIONER

Petitioner Adrian Moncrieffe respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion, Pet. App. 1a-9a, is published at 662 F.3d 387. The opinions of the immigration judge, Pet. App. 14a-18a, and the Board of Immigration Appeals, *id.* 10a-13a, are unreported.

JURISDICTION

The Fifth Circuit issued its decision on November 8, 2011. Pet. App. 1a. Petitioner timely filed a petition for a writ of certiorari on December 8, 2011. This Court granted the petition on April 2, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

A non-citizen "convicted" of a "felony punishable under the Controlled Substances Act" (CSA) is subject to mandatory deportation. Under the CSA, some convictions for the distribution of marijuana are punishable as felonies; others are instead merely misdemeanors.

The "categorical approach" determines whether a drug conviction is a felony punishable under the CSA. The relevant question is whether the conviction itself

"necessarily" corresponds – *i.e.*, equates – to the federal felony. The facts of the offense are irrelevant.

The Fifth Circuit held in this case that every marijuana distribution conviction is a felony requiring mandatory deportation, unless immigration authorities find, based on facts outside the conviction, that the offense corresponds to the misdemeanor.

I. Statutory Background

1. In the Immigration and Nationality Act (INA), Congress provided that a conviction for a marijuana-related offense may trigger three distinct immigration consequences, depending on its seriousness. First, a single conviction for possessing thirty grams or less of marijuana for personal use renders a non-citizen inadmissible, 8 U.S.C. § 1182(a)(2)(A)(i)(II), but has no deportation consequences, *id.* § 1127(a)(2)(B)(i).

Second, a conviction for an ordinary violation of a state or federal drug law is a "controlled substance" offense. *Id.* The non-citizen is removable, but if he is a long-time U.S. resident the Attorney General retains the discretion to "cancel" the order of removal. *Id.* § 1229b(a).

Third, a conviction for "illicit trafficking in a controlled substance" is an "aggravated felony." *Id.* § 1101(a)(43)(B). Illicit trafficking includes a "felony punishable under the Controlled Substances Act." 21 U.S.C. § 924(c)(2). The non-citizen convicted of such an offense is subject to the "harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010). In contrast to a controlled substances offense, the non-citizen is categorically

ineligible for cancellation of removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3).

Under this scheme, Congress provided that many marijuana-related convictions do not trigger mandatory deportation because they do not correspond to a felony under the Controlled Substances Act. As noted, possession of thirty grams or less for personal use does not have any deportation consequences at all. The CSA also includes two marijuana-related misdemeanors: first-time simple marijuana possession, 21 U.S.C. § 844; and distribution of a small amount for no remuneration, which Congress provided "shall be treated" as simple possession, *id.* § 841(b)(4). Other marijuana-related convictions are felonies. *Id.* § 841(b)(1)(A)-(E).

2. The INA applies as well to drug convictions under statutes other than the CSA, including state laws. *See* 8 U.S.C. § 1101(a)(43) (penultimate sentence). Whether a state conviction is an "aggravated felony" and is therefore subject to mandatory deportation depends on whether it corresponds to a felony "under the [CSA]"; the state-law penalty is not relevant. *Lopez v. Gonzales*, 549 U.S. 47, 53-57 (2006).

That correspondence is resolved under the "categorical approach." *See* BIO 6. The operative phrase in the INA – "illicit trafficking" – is a "generic" offense that refers to how the federal crime is ordinarily committed, not to the facts of the individual offense. *Carachuri-Rosendo*, 130 S. Ct. at 2580-81, 2586 n.11; *see Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). So the predicate "conviction" must itself include all of the findings that "*necessarily*" establish the correspondence to the federal offense,

Shepard v. United States, 544 U.S. 13, 24 (2005) (emphasis added) – here, a "felony punishable under the Controlled Substances Act." *See Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012). The facts of the particular offense are not relevant. *Taylor v. United States*, 495 U.S. 575, 599-600 (1990).

This Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), is illustrative. There, the non-citizen was convicted of drug possession under state law. It was indisputably his second offense, and recidivist drug possession (as opposed to a first offense) is a "felony punishable under the [CSA]." *See* 21 U.S.C. §§ 844, 851. But the conviction *itself* included no finding of recidivism. The Fifth Circuit held that the conviction was a felony because in a "hypothetical" federal prosecution under the CSA the court could have made a finding of recidivism. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009) (Jones, C.J.). But this Court reversed. It held that under the categorical approach, the conviction itself must include each of the findings necessary to render the conviction punishable as a felony under the CSA. The court of appeals accordingly erred in permitting further fact-finding outside the conviction to determine that the non-citizen was a recidivist. *See Carachuri-Rosendo*, 130 S. Ct. at 2586-87.

II. Factual And Procedural History

1. Petitioner's family legally entered the United States from Jamaica in 1984, when he was three years old. Petitioner grew up, went to school, worked in several fields, married, and had two children, all in the United States. All the members of his immediate

family are U.S. citizens, and he has almost no remaining ties to Jamaica.

In 2009, while driving with an acquaintance to see his daughter, petitioner was pulled over by local police officers in Georgia. The car contained 1.3 grams of marijuana, equivalent to two-and-a-half marijuana cigarettes. *See* U.S. Sentencing Guidelines Manual § 2D1.1 cmt. 11 (2011) (stating that the "typical weight" of a single marijuana cigarette is 0.5 grams).

The State charged petitioner with possession of marijuana with intent to distribute under Ga. Code § 16-13-30(j)(1). That statute criminalizes a broad range of conduct, including both the social sharing of small amounts of the drug for no remuneration and also the distribution of larger amounts. *See infra* at 18-19. Georgia separately criminalizes the distribution of large drug quantities (more than ten pounds) as "trafficking." Ga. Code § 16-13-31(c).[1]

Under a statute governing first-time drug offenders like petitioner, Georgia courts may withhold entering a judgment of conviction or imposing any term of imprisonment. So long as the

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[1] The Georgia statute under which petitioner was convicted makes it a crime for the defendant to "possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga. Code § 16-13-30(j)(1). The parties agree that petitioner's conviction was for "possession with intent to distribute." *See Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010) (holding that courts may consult a plea agreement to determine "which statutory phrase was the basis for the conviction"); App., *infra*, at 11.

defendant successfully completes a term of probation, the charges are expunged altogether. *See* Ga. Code §§ 16-13-2, 42-8-60. Petitioner accepted a plea agreement with those terms, *see* App., *infra*, at 11-12, and in the interim has complied with all the conditions of his probation.

2. Two years after petitioner's plea, federal immigration officials jailed him and sought to deport him, alleging that his Georgia conviction was either a "controlled substances" offense or an "aggravated felony."[2]

The immigration judge held that petitioner's case was controlled by the holding of the Board of Immigration Appeals (B.I.A.) that every marijuana distribution conviction is *ipso facto* an "aggravated felony." Pet. App. 18a (citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008)). The B.I.A. affirmed on the same basis in a brief opinion. *Id.* 10a.

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[2] Although petitioner's prosecution was suspended, he has not argued that the absence of a state judgment of conviction meant that he was not "convicted" at all for purposes of the INA, *cf.* BIO 3 n.1, so that issue is not presented by this case.

For its part, the Government has not argued that the misdemeanor provision of Section 841(b)(4) does not apply here because petitioner was convicted of "possession with intent to distribute," rather than "distribution." The Board of Immigration Appeals and the federal courts of appeals agree that, by deeming both "possession" and "distribution" of marijuana to be misdemeanors, Congress necessarily intended to also include "the more inchoate offense of possession with intent to distribute that drug." *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 699 n.2 (B.I.A. 2012). That question is not presented by this case either.

3. The Fifth Circuit denied petitioner's petition for review. Pet. App. 1a (Jones, C.J.). The court acknowledged that the Second and Third Circuits have held that a conviction like petitioner's – *i.e.*, one for marijuana distribution that contains no finding of either drug quantity or remuneration – is not an "aggravated felony," so that the non-citizen is eligible for cancellation of removal. *E.g.*, *Martinez v. Mukasey*, 551 F.3d 113, 120-21 (2d Cir. 2008); *Evanson v. Attorney General*, 550 F.3d 284, 291 (3d Cir. 2008). Applying the categorical approach, those courts reason that the conviction is not an aggravated felony because the findings established by the conviction do not "necessarily" correspond to a felony. Rather, the conviction is also consistent with the non-remunerative sharing of a small amount of marijuana, a misdemeanor under 21 U.S.C. § 841(b)(4).

But the Fifth Circuit rejected those decisions. It reasoned that under the categorical approach petitioner's conviction established that he had possessed marijuana with the intent to distribute, but (because drug quantity is irrelevant under the statute of conviction) left "indeterminate" the quantity of marijuana. Pet. App. 7a. The indeterminacy should be resolved against the non-citizen, the court opined, because in a criminal prosecution the defendant has the burden to prove that his conviction is only a misdemeanor. *Id.* 8a.

The court of appeals found its decision "compel[led]" by its prior precedent addressing the burden of proof in federal marijuana distribution prosecutions. *Id.* 7a. According to those decisions, a conviction for marijuana distribution corresponds "by

default" to the felony of distributing less than fifty kilograms of marijuana under 21 U.S.C. § 841(b)(1)(D). Pet. App. 6a. By contrast, the provision addressing the distribution of a small amount for no remuneration, Section 841(b)(4), is a "mitigating" exception. Pet. App. 7a. On that reading, because the felony provision does not increase the defendant's maximum sentence, the Sixth Amendment does not require the Government to prove that the misdemeanor provision does not apply. *Id.* (citing *United States v. Walker*, 302 F.3d 322, 324 (5th Cir. 2002)) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). For that reason, if the quantity of marijuana is ultimately "indeterminate" in a federal prosecution, the conviction is a felony. Pet. App. 7a-8a.

Extending that Sixth-Amendment-based rule to the INA, the Fifth Circuit held that all marijuana distribution convictions that are silent with respect to either drug quantity or remuneration correspond to a felony. But whereas the B.I.A. had applied a categorical rule that all such convictions are "aggravated felonies," the court of appeals indicated that immigration authorities could conduct further fact-finding under which (as in a criminal prosecution) the non-citizen bears the burden to prove that his offense instead corresponds to the misdemeanor. *Id.* 9a. The court held that petitioner had waived that opportunity, however, by not introducing evidence of the facts of his case in the administrative proceedings. *Id.* 9a n.4.

4. After the Fifth Circuit issued its decision, the B.I.A. modified its precedent to adopt the same rule as the court of appeals. It held that immigration

officials should conduct fact-finding on whether the offense corresponds to the CSA's misdemeanor provision, with the burden of proof on the non-citizen. *See In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 701-02 (B.I.A. 2012). In that further proceeding, "any probative evidence" is relevant, without regard to whether it was considered in the predicate criminal proceedings. *Id.*

5. This Court granted certiorari. 132 S. Ct. 1857 (2012).

SUMMARY OF THE ARGUMENT

The Government alleges, and the Fifth Circuit agreed, that petitioner was convicted of the aggravated felony of illicit trafficking in a controlled substance. As the Solicitor General recognizes, that determination is governed by the "categorical approach." The dispositive question is whether petitioner's conviction "necessarily" corresponds to a "felony punishable under the Controlled Substances Act."

It does not. Congress provided that a marijuana-related conviction may or may not be a felony, depending on the amount of marijuana involved and whether the defendant received any remuneration. In this case, because of the breadth of the state statute under which he was charged, petitioner's conviction is consistent with either a misdemeanor or a felony under the CSA. The conviction establishes only two facts: that petitioner possessed marijuana, and that he had the intent to distribute. But those features are shared by both the felony defined by Section 841(b)(1)(D) of the CSA and also the misdemeanor under Section 841(b)(4).

The conviction does not establish either of the facts that would preclude misdemeanor treatment: that petitioner possessed more than a small quantity of marijuana, or that he received remuneration. It therefore does not "necessarily" correspond to a felony. Indeed, considering the features of petitioner's conviction – *e.g.*, that he possessed only 1.3 grams of marijuana, and was sentenced only to probation – the phrases "illicit trafficking" and "aggravated felony" are strikingly inapt.

That does not mean that petitioner is *ineligible* for deportation. Even minor controlled substances offenses are grounds for removal. The critical difference is that in such cases the Attorney General has the discretion whether to cancel removal. That discretionary authority ensures that the straightforward application of the categorical approach presents no threat to the Government's authority to deport serious drug offenders.

The Fifth Circuit's contrary ruling repeats the error that court recently made in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). In both cases, the court of appeals refused to limit its analysis to the facts established by the non-citizen's conviction, looking instead to whether the offense could be deemed a felony in a hypothetical federal prosecution. Here, the Fifth Circuit found dispositive that in a federal prosecution for marijuana distribution in which the amount of marijuana is "indeterminate," the offense is a felony. But as this Court held in *Carachuri-Rosendo*, the "categorical approach" is limited to the facts established by the conviction itself, which must establish that the conviction necessarily corresponds to a felony. Any

indeterminacy is thus resolved in the non-citizen's favor.

The ruling below also contravenes Congress's obvious intent to account for the misdemeanor defined by Section 841(b)(4) in immigration cases. The misdemeanor plays an important role under the INA: it both specifies a "controlled substances" offense that renders the non-citizen removable, and also ensures that minor marijuana distribution offenses – including, for example, the simple sharing of a marijuana cigarette among friends – do not result in automatic removal.

The Fifth Circuit's apparent view that Congress intended to account only for Sixth Amendment offense "elements," not sentencing factors like the misdemeanor provision, conflicts with the INA's text, and cannot be reconciled with its history. The INA asks whether the non-citizen was "convicted" of a "felony." It makes no difference whether the distinguishing factor between a felony and a misdemeanor conviction is labeled an "element" or a "sentencing factor." The INA directs the courts to consider that distinction in determining the seriousness of the non-citizen's offense. Congress never limited the inquiry to elements, and it would have made no sense to do so, because at the time that Congress enacted the relevant provision of the INA, *all* of the penalty provisions of Section 841(b) – including both the felony and the misdemeanor applicable to marijuana distribution – were regarded as sentencing factors. So even on the illogical assumption that Congress intended the Sixth Amendment to guide the INA's application, it would

not have understood the provisions at issue here to be distinguishable on that basis.

The Fifth Circuit compounded the conflict with this Court's decisions by indicating that immigration authorities should conduct fact-finding to determine whether the non-citizen's offense corresponds to a misdemeanor. The essential feature of the categorical approach, as this Court reiterated in recently reversing the Fifth Circuit in *Carachuri-Rosendo*, is that the "conviction" is dispositive; additional facts that might later be found by an immigration officer are irrelevant.

The primary purpose of the categorical approach is to avoid collateral litigation – mini-trials over the facts of the prior offense. But the Fifth Circuit's rule will require precisely that. Immigration authorities must attempt to determine, based on cold records, often years old and assembled by myriad state and local governments, whether a non-citizen possessed more than a small amount of marijuana, and received remuneration for distributing it. Many records will not contain this information, because those facts were not germane to the offense of conviction. The record indeed may include almost no facts at all, as such cases are often resolved by a quick plea agreement in which, as in this case, the proceedings are deferred and the defendant receives no jail time.

The categorical approach also seeks to avoid imposing an unfair burden on individuals who may be subject to the harsh sanction of deportation. The ruling below, however, fails to account for the special difficulties faced both by non-citizens facing deportation and immigration officials. The individual will often be detained in immigration facilities far

from the jurisdiction in which he was convicted. He frequently will have no lawyer, and no access to a computer or telephone. Immigration judges are already grossly overburdened. And other immigration authorities will have little to no capacity to develop the facts contemplated by the court of appeals, because they often make "aggravated felony" determinations without any adversarial proceeding at all. Inevitably, vast administrative and judicial resources will be squandered, and many immigrants who in fact committed only minor marijuana offenses will be unjustly deported as the system nevertheless fails to reveal the facts underlying their convictions.

At the certiorari stage, the Solicitor General advanced the still-broader theory that only offense "elements" are relevant under the categorical approach. On that view, the misdemeanor under Section 841(b)(4) is "irrelevant." The logical consequence of that position is that a conviction for the "misdemeanor" of distributing a small amount of marijuana for no remuneration would always be deemed an "aggravated felony." That argument defeats itself. It would mean, for example, that someone convicted in a federal prosecution of a Section 841(b)(4) misdemeanor is nonetheless treated as an aggravated felon for immigration purposes, which makes no sense.

The Government made the identical "elements" argument in *Carachuri-Rosendo*, and lost. This Court explained that the categorical approach must account for sentencing factors – in that case, recidivism – which must be established by the conviction. Here, because petitioner's conviction does not necessarily establish that petitioner was

convicted of a felony rather than a misdemeanor under the Controlled Substances Act, his conviction was not an "aggravated felony."

ARGUMENT

Petitioner, a first-time drug offender, was arrested with 1.3 grams of marijuana while driving with another individual. He pleaded guilty to a state offense of possessing marijuana with intent to distribute. No conviction was entered, he received probation, and the charges will soon be expunged altogether. The United States nonetheless arrested petitioner, jailed him for eight months, and then permanently deported him without any inquiry into whether his circumstances warrant cancellation of removal. For this first offense, involving marijuana weighing the equivalent of half a penny, the Government has permanently separated petitioner from his family and the life that he had built in this country over the previous quarter-century.

That result cannot be reconciled with either the applicable statutes or common sense. The laws enacted by Congress and state governments alike treat such first-time, minor marijuana convictions leniently. The CSA and Georgia law both provide that such offenses do not merit even a formal conviction, much less jail time. The INA provides that the simple possession of substantially *more* marijuana has no deportation consequences *at all*.

The Government nonetheless argued, and the court of appeals agreed, that petitioner's conviction was so grave that it constituted the "aggravated felony" of drug "trafficking," such that Congress stripped the Attorney General of the discretion even

to consider whether petitioner should be granted cancellation of removal. That conclusion lacks merit. The case should be remanded for the B.I.A. to consider the Government's claim that petitioner's conviction is a "controlled substances" offense and, if so, whether petitioner should be granted discretionary cancellation of removal.

I. Under The Categorical Approach, Petitioner's Plea Does Not Establish That He Was Convicted Of A Felony, Rather Than A Misdemeanor, Under The Controlled Substances Act.

A. The Categorical Approach Looks To Whether The Conviction Necessarily Corresponds To A Federal Felony.

The Fifth Circuit held that petitioner was convicted of "illicit trafficking in a controlled substance." This Court has recognized that the INA's "illicit trafficking" provision is a "generic" offense. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586 n.11 (2010); *Nijhawan v. Holder*, 557 U.S. 129, 137 (2009). The correspondence between a predicate conviction and a generic federal offense is determined by the "categorical approach," in contrast to a "circumstance-specific" inquiry that turns on the particular facts of the case. *See, e.g.*, *Carachuri-Rosendo*, 130 S. Ct. at 2586 n.11. The Government acknowledges that the categorical approach governs this case. BIO 6.

The categorical approach imposes on the Government "the *demanding* requirement" that the conviction "'necessarily' involved (and a prior plea necessarily admitted) facts equating to" the federal

felony. *Shepard v. United States*, 544 U.S. 13, 24 (2005) (emphasis added). That requirement is met "[o]nly" if the court in entering the conviction "necessarily had to find" the features of the federal offense. *Id.* at 17 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The conviction itself must thus "establish" and "necessarily entail" that the non-citizen committed the corresponding federal crime. *Kawashima v. Holder*, 132 S. Ct. 1166, 1172-73 (2012).

For example, in *Carachuri-Rosendo*, the non-citizen was convicted of drug possession. That was indisputably his second possession offense, and recidivist drug possession is an "aggravated felony." *See* 21 U.S.C. §§ 844(a), 924(c)(2). But the "conviction" itself included no finding of recidivism. 130 S. Ct. at 2586. As a consequence, it was impossible to determine from the fact of conviction alone whether the conviction corresponded to a felony under the CSA. Applying the categorical approach, this Court held that the conviction corresponded to *non*-recidivist simple possession, which is a misdemeanor under the CSA. *See id.* at 2586-87; 21 U.S.C. § 844(a). It made no difference that the immigration judge could find as a matter of fact that the non-citizen was a recidivist, because that fact was not established by the "conviction." 130 S. Ct. at 2587.

These defining features of the categorical approach – the refusal to consider evidence outside the conviction, and the requirement that the conviction itself necessarily establish that the conviction corresponds to the federal offense, so that any ambiguity is resolved in the non-citizen's favor –

are well-established features of federal immigration law. By 1945, the B.I.A. considered the categorical approach to be a "settled judicial principle[]," *Matter of S-*, 2 I. & N. Dec. 353, 357 (B.I.A. 1945), and had "repeatedly explained the basis for this rule as respecting the limits of agency power and the need for fixed and efficient standards in the administration of immigration law," Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1697 (2011). Courts took the same view. In *United States ex rel. Robinson v. Day*, for example, Judge Learned Hand concluded, with respect to the "crime of moral turpitude" ground for deportation, that "[w]hen by its definition [the predicate crime] does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." 51 F.2d 1022, 1022-23 (2d Cir. 1931). *See also, e.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (finding a state conviction could not trigger deportation unless it was "necessarily" or "inherently" immoral).

The demanding requirements of the categorical approach parallel the law's equally longstanding tradition of construing ambiguity in favor of those upon whom the Government seeks to impose the harsh sanction of deportation. *See, e.g.*, *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("To construe this statutory provision less generously to the alien might find support in logic.

But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). That rule of construction is particularly appropriate when, as in this case, removability turns on the interpretation of a criminal statute. *Carachuri-Rosendo*, 130 S. Ct. at 2589 ("[A]mbiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor." (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004))).

B. Petitioner Was Not Convicted Of An Aggravated Felony Because His Plea May Correspond To Either A Misdemeanor Or A Felony Under The Controlled Substances Act.

1. In the INA, Congress specified that marijuana-related offenses may give rise to three different immigration consequences, depending on the seriousness of the conviction. The non-citizen may face no deportation consequences at all (for first-time simple possession of thirty grams or less); possible deportation, with the right to seek cancellation of removal (for a conviction that does not correspond to a "felony under the Controlled Substances Act"); or mandatory deportation (for a conviction that corresponds to such a felony). *See supra* at 2-3.

The Fifth Circuit held that petitioner's Georgia plea falls within the last of these three categories, subjecting him to the harshest immigration consequences. That was error. Under the categorical

approach, petitioner's conviction does not necessarily correspond to a felony violation of the CSA, as opposed to a provision triggering a lesser immigration sanction.

Petitioner's conviction is silent on the quantity of drugs in his offense and whether he received remuneration, because those facts are irrelevant under the statute of conviction. The statute applies to violations involving larger amounts (though presumably less than the ten pounds that constitutes "trafficking" under Georgia law), amounts that are indeterminate, and very small amounts (as in petitioner's own case). Further, no remuneration is required. To "distribute" is merely "to deliver a controlled substance, other than by administering or dispensing it." Ga. Code § 16-13-21(11). The offense occurs so long as the defendant did not merely "intend[] to use the [drugs] himself." *Florence v. State*, 637 S.E.2d 779, 782 (Ga. App. 2006). Sharing among friends is sufficient. *See Hadden v. State*, 353 S.E.2d 532, 534 (Ga. App. 1987) (giving marijuana away is "distribution," because it involves "the actual or constructive delivery of a controlled substance").

Petitioner's guilty plea accordingly establishes only two facts: that petitioner possessed some amount of marijuana, and that he had the intent to provide it to some other person. *See* BIO 7. Those findings could be consistent with *either* a felony or a misdemeanor under the CSA. *See* 21 U.S.C. §§ 841(b)(1)(D), 841(b)(4).

When a conviction may encompass an array of conduct, only some of which corresponds to the relevant offense, the categorical approach provides that the conviction "rested upon . . . the least of these

acts." *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). Here, the least of the acts covered by the statute of conviction – possession of a small amount of marijuana with intent to distribute for no remuneration – is a misdemeanor. And when there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime," *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the federal offense – here, the felony under Section 841(b)(1)(D) – has not been established.

Many non-citizens subject to the Fifth Circuit's holding unquestionably will have engaged in precisely the social sharing of marijuana that Congress decided should *not* trigger mandatory deportation. There is no basis for the Fifth Circuit's assumption that a conviction is a felony, when it "could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Martinez v. Mukasey*, 551 F.3d 113, 120 (2d Cir. 2008). In fact, the misdemeanor provision directly incorporates the simple possession provision that this Court held in *Carachuri-Rosendo* is not an "aggravated felony." 130 S. Ct. at 2581; *see* 21 U.S.C. §§ 841(b)(4), 844.

2. The Government's contrary arguments are inconsistent with how the relevant provisions of the CSA function. The Solicitor General asserts that "the CSA authorizes a felony sentence without regard to that paragraph [Section 841(b)(4)]." BIO 9. That is a gross misreading of the felony provision, which by its terms is inapplicable to a conviction subject to the misdemeanor provision. The applicable felony

provision, Section 841(b)(1)(D), applies "*except* as provided in paragraph[] (4) . . . of this subsection" (emphasis added) – *i.e.*, the misdemeanor provision. In turn, the misdemeanor provision, Section 841(b)(4), provides that a conviction for the distribution of a small amount of marijuana for no remuneration "shall be treated as" a misdemeanor, "*[n]otwithstanding* paragraph (1)(D)" (emphasis added) – *i.e.*, the felony provision. *See also* BIO I (when the requirements of Section 841(b)(4) are met, "the offense is treated as a misdemeanor"). Thus, a conviction "necessarily" corresponds to a felony only if it includes findings that preclude the application of the misdemeanor provision and, thereby, trigger application of the felony.

For the same reason, the Government is mistaken in asserting that "the 'minimum criminal conduct' sufficient to obtain a conviction under Georgia law also *suffices* to obtain a felony conviction under the CSA." BIO 17 (emphasis added). The Georgia statute is violated by the social sharing of very small amounts of marijuana. Even the Fifth Circuit recognized that "distribution of 'a small amount of marijuana for no remuneration' falls under the Georgia provision but is only a misdemeanor under 21 U.S.C. § 841(b)(4)." Pet. App. 3a. Such a conviction corresponds to the federal misdemeanor, and hence is not an "aggravated felony" that triggers mandatory deportation.

3. The straightforward application of the categorical approach is confirmed by a "commonsense" reading of the relevant statutory terms. *See Carachuri-Rosendo*, 130 S. Ct. at 2585 (citing *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)). It

would be highly anomalous for Congress to deem a conviction like petitioner's to be so serious that the Attorney General must be stripped of his authority even to *consider* whether to grant petitioner cancellation of removal.

"[O]rdinarily 'trafficking' means some sort of commercial dealing," *Carachuri-Rosendo*, 130 S. Ct. at 2585 (citing *Lopez*, 549 U.S. at 53-54), generally reflected in "significant amounts" of drugs, *Black's Law Dictionary* 1635 (9th ed. 2009). Georgia and many other states have "trafficking" offenses which reflect that understanding. *See* Ga. Code § 16-13-31(c) (offenses of greater than ten pounds are "trafficking").[3] In this case, petitioner possessed only 1.3 grams of marijuana. The fact that petitioner's conviction does not conform to that "everyday understanding of 'trafficking' should count for a lot." *Lopez*, 549 U.S. at 53.

Also, an "aggravated felony" is generally a grave offense. In *Carachuri-Rosendo*, the Court seriously doubted that label applied to the petitioner's offense, given that he received only ten days' imprisonment. 130 S. Ct. at 1585. Here, petitioner's sentence of probation was even lighter. Under Georgia law, like

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[3] *See* Ala. Code 13A-12-231(1); Ark. Stat. § 5-64-440(b)(5); Fla. Stat. 893.135(1)(a);; Idaho Code 37-2732B(a)(1); 720 Ill. Comp. Stat. 550/5.1; Mass. Gen. Laws ch. 94C, § 32E(a); Mo. Stat. § 195.222(7); *id.* § 195.223(7)-(8); Nev. Rev. Stat. § 453.339; N.C. Gen. Stat. § 90-95(h)(1); Okla. Stat. tit. 63, § 2-415(C)(1); 18 Pa. Cons. Stat. § 7508(a)(1); S.C. Code § 44-53-370(e)(1); Vt. Stat. tit. 18, § 4230(c) (all requiring a minimum amount of marijuana); Mich. Comp. Laws § 777.45(1)(g), (2)(c); Miss. Code. § 41-29-139(g) (both requiring ongoing transactions).

the CSA, a first-time drug offender receives no imprisonment, and if he complies with the terms of probation the charges are expunged altogether. *See* Ga. Code § 16-13-2(a); 21 U.S.C. § 841(b)(4); 18 U.S.C. § 3607.

The Government inevitably will argue that under petitioner's position some individuals who engaged in substantial marijuana transactions could avoid *automatic* deportation if convicted under a statute like Georgia's. But offenses involving larger marijuana quantities or commercial sales will often result in convictions under separate provisions criminalizing drug "trafficking," which is a "felony punishable under the Controlled Substances Act" because it establishes that the non-citizen distributed more than a small amount. *See, e.g.*, *supra* at 22 & n.3. But even when that is not so, as this Court explained in rejecting an indistinguishable argument in *Carachuri-Rosendo*, deeming drug convictions to be "controlled substances" offenses rather than aggravated felonies has only a "limited" effect on "policing our nation's borders," because the non-citizen's entitlement to cancellation of removal "depends on the discretion of the Attorney General." 130 S. Ct. at 2589.

In any event, the Government's argument amounts to an attack on the categorical approach itself, which looks to the statute of conviction, not the facts of the particular offense. This Court has consistently rejected similar arguments about the resulting underinclusiveness of the categorical approach, which are "as much a menace" to, and "a call to ease away from," the categorical approach altogether as "a justification for an expansive

approach to showing whether a guilty plea admitted the generic crime." *Shepard*, 544 U.S. at 22-23. The Court "cannot have" the categorical approach "and the Government's position both." *Id.* at 23.

II. The Rationale Of The Fifth Circuit And The Government's Alternative "Elements" Theory Both Lack Merit.

A. The Fifth Circuit's Decision Reinstates The Hypothetical Approach That This Court Rejected In *Carachuri-Rosendo*.

1. The only plausible factual distinction between this case and *Carachuri-Rosendo* is the burden of proof in hypothetical criminal prosecutions of the non-citizens. Both cases involve convictions under state drug statutes that encompass both some conduct that is a federal misdemeanor and other conduct that is a federal felony. The simple possession considered in *Carachuri-Rosendo* is a misdemeanor, but a felony if the Government properly proves the defendant is a recidivist. 21 U.S.C. §§ 844, 851. In this case, distribution of marijuana is a felony, but a misdemeanor if the defendant proves he distributed only a small amount for no remuneration. *Id.* §§ 841(b)(1)(D), 841(b)(4).

The Fifth Circuit found that distinction to be dispositive. It reasoned that, in a criminal case, "the default punishment for any possession of marijuana with intent to distribute is equivalent to a felony under the CSA." Pet. App. 8a. Because the Sixth Amendment requires the Government to prove only those facts that increase the maximum sentence for a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), it is the defendant who bears "the burden to

prove that he was convicted of only misdemeanor conduct. Otherwise, as is true for federal defendants charged under 21 U.S.C. § 841, his crime is equivalent to a federal felony." Pet. App. 9a (citation and footnote omitted).

The Fifth Circuit held that it should treat marijuana distribution the same "for immigration purposes as for sentencing purposes." *Id.* 8a. The court of appeals reasoned that under the categorical approach the only findings established by petitioner's conviction were that he possessed marijuana and had the intent to distribute. By contrast, the conviction left "indeterminate" the quantity of marijuana, because quantity is not relevant under the statute of conviction. *Id.* 13a. As in a criminal prosecution, the court construed that indeterminacy against the defendant. As the Government puts it, "[i]f petitioner had been charged in federal court, he could not have invoked the one-year statutory maximum unless he carried the burden of showing that his offense involved only a small amount of marijuana and no remuneration." BIO 13.

2. The classification of petitioner's state conviction is governed by the long-established categorical approach – which requires the *Government* to establish *all* the facts necessary to show that the non-citizen committed the equivalent of the federal felony, based *solely* on the record of conviction – not by Sixth Amendment principles that constrain the allocation of burdens of proof in a criminal trial. Thus, the root flaw in the Fifth Circuit's reasoning is that the categorical approach does not ask what would result if the non-citizen were hypothetically tried in federal court based on

the findings established by the predicate state conviction. Rather, the question is whether the state conviction "necessarily" establishes that the conviction corresponds to the federal offense – here, a felony under the CSA rather than a misdemeanor. That is a "demanding" standard, *Shepard*, 544 U.S. at 24, and it is not met here. Under the categorical approach, the indeterminacy regarding the amount of marijuana petitioner possessed means that the conviction is not "necessarily" a felony rather than a misdemeanor.

The Fifth Circuit's contrary reasoning repeats precisely the error that this Court identified in *Carachuri-Rosendo*. The predicate conviction in that case established that the defendant had possessed drugs. The conviction included no finding of recidivism, but neither did it negate the fact that the non-citizen had a prior drug conviction – as here, it left the matter "indeterminate." The court of appeals resolved that indeterminacy by holding that further fact-finding beyond the categorical approach was appropriate to determine whether the non-citizen could have been found to be a recidivist in a "hypothetical" federal prosecution. *Carachuri-Rosendo v. Holder*, 570 F.3d 264, 266 (5th Cir. 2009).

This Court reversed, reaffirming its commitment to "the more focused, categorical inquiry," 130 S. Ct. at 2588, under which the findings established by the conviction must necessarily establish the federal felony. The Court explained that the Fifth Circuit's hypothetical analysis "ignores the text of the INA, which limits the Attorney General's cancellation power only when, *inter alia*, a noncitizen 'has . . . been *convicted* of a[n] aggravated felony.' 8 U.S.C.

§ 1229b(a)(3) (emphasis added)." 130 S. Ct. at 2586. "The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). By contrast, the Fifth Circuit's analysis "focuses on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment." 130 S. Ct. at 2588 (emphasis in original). Under the categorical approach, an immigration judge "cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under . . . federal law." *Id.* at 2586-87.

The Fifth Circuit relied in this case on the fact that in a hypothetical criminal prosecution in federal court petitioner would have had the "burden to prove" that his state conviction was punishable under 21 U.S.C. § 841(b)(4). Pet. App. 9a. But that reasoning fails to recognize that the "very basis of the categorical approach is that the *sole* ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction." *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008) (emphasis in original). Here, because the findings established by petitioner's plea agreement are equally consistent with a federal misdemeanor, petitioner was not "convicted" of an "aggravated felony."

In *Carachuri-Rosendo*, this Court also recognized that the Fifth Circuit's "hypothetical" approach was "misleading as well as speculative, in that [the non-citizen's] federal-court counterpart would *not*, in actuality, have faced any felony charge," because his

Guidelines sentence "would not have exceeded one year, and very likely would have been less than 6 months." *Id.* at 2589. The results of the hypothetical prosecution imagined by the Fifth Circuit in this case are no less misleading. A conviction for the distribution of a small amount of marijuana for no remuneration is subject to a misdemeanor charge with a sentence of probation, after which the charges are expunged. *See* 21 U.S.C. § 841(b)(4) (incorporating 18 U.S.C. § 3607). Petitioner's own Guidelines sentence could not have exceeded twelve months, and likely would have been zero to six months. *See* U.S. Sentencing Guidelines Manual § 2D2.1 (base offense level 4); *id.* ch. 5, pt. A (sentencing table).

3. There are also other reasons why Congress could not have intended to exclude Section 841(b)(4)'s misdemeanor provision from the categorical inquiry. Congress's clear judgment that the misdemeanor offense was less serious and should trigger more lenient immigration sanctions obviously must be considered in the determination whether a conviction is an "aggravated felony." By contrast, the characteristic on which the Fifth Circuit seized – whether a provision of the CSA states a "mitigating" exception under the Sixth Amendment, so the burden of proof is on the defendant – bears no relationship to the offense's seriousness.

Whether a conviction was a misdemeanor under Section 841(b)(4), and hence only a "controlled substances" offense, is thus critical to the application of the INA to a marijuana-related conviction, and a plethora of immigration consequences hinge on whether the non-citizen commits a misdemeanor or a

felony. If the conviction is a felony, and therefore an aggravated felony for immigration purposes, it triggers mandatory deportation because the offender is ineligible for cancellation of removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3). The non-citizen is moreover foreclosed from seeking readmission to the United States, *id.* § 1182(a)(9)(A)(ii); unable to apply for asylum, *id.* § 1158(b)(2)(A)(ii), (B)(i); and prohibited from demonstrating the "good moral character" needed for naturalization, *id.* § 1101(f)(8); 8 C.F.R. § 316.2(7). Further, "the Federal [Sentencing] Guidelines attach special significance to the 'aggravated felony' designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for 'any other felony.'" *Lopez v. Gonzales*, 549 U.S. 47, 51 (2006).

For marijuana distribution offenses, Section 841(b)(4) is thus the provision that determines whether the "conviction" is a felony – triggering all those harsh consequences – or instead a "misdemeanor." As the Government argued with respect to recidivism in *Carachuri-Rosendo*, Section 841(b)(4), "a statutory sentencing prerequisite (made relevant because of the word 'punishable'), rather than offense elements, is what [determines whether a marijuana distribution offense is] punishable as a felony." U.S. *Carachuri-Rosendo* Br. 25 n.11.

Nor is there any other feature of the felony defined by Section 841(d)(1)(D) that suggests Congress would have wanted that provision, but *not* the misdemeanor provision of Section 841(b)(4), considered in determining whether a conviction

should trigger mandatory removal. Both provisions establish a sentencing range depending on features of the offense: drug type (marijuana); and quantity (small amounts and less than fifty kilograms). Under Section 841(b), those features of a conviction can dictate a maximum sentence of anywhere from one year (Section 841(b)(4)) to life imprisonment (Section 841(b)(1)(A)). Although the misdemeanor provision refers to remuneration, that is a common element of criminal statutes. *See, e.g.*, 18 U.S.C. § 1958 (murder-for-hire); 18 U.S.C. § 1384 (prostitution near a military or naval installation); 17 U.S.C. § 506(a)(1)(A) (copyright infringement is criminal when done "for purposes of commercial advantage or private financial gain"); 15 U.S.C. § 377(a)(2)(B)(i) (evasion of cigarette distribution laws by a common carrier is criminal if done for pecuniary gain).

Even putting the categorical rule to the side, Congress could not have intended to enact the Fifth Circuit's distinction between those provisions of the CSA that state Sixth Amendment "elements" and those (like Section 841(b)(4)) that do not. At the time the provision in question was adopted, that distinction *did not exist*. Congress adopted the relevant statutory language – providing that "aggravated felony" includes "a drug trafficking crime (as defined in section 924(c) of Title 18)," 8 U.S.C. § 1101(a)(43)(B) – in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, § 7342 (1988). At that time, all but one of the courts of appeals to have considered the question deemed all of Section 841(b) – including both the felony provision of Section 841(b)(1)(D) and the misdemeanor provision of Section 841(b)(4) – to be *sentencing factors*. *See,*

e.g., *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990) (adopting the "clear majority" view). That did not change until twelve years later, when this Court held in its path-marking decision in *Apprendi* that under the Sixth Amendment facts that increase the maximum punishment are "elements" that must be proved to the jury beyond a reasonable doubt. *See, e.g.*, *United States v. Soto-Beniquez*, 356 F.3d 1, 45-46 (1st Cir. 2004) (explaining that under *Apprendi*, whenever a defendant is sentenced to more than the "default" maximum of 5 years for a first-time offender, additional facts, including drug type and quantity, must first be found by the jury).

B. The Fifth Circuit's Decision Requires The Fact-Finding That The Categorical Approach Forbids.

1. The court of appeals compounded its failure to follow this Court's precedents by reverting to the fact-specific inquiry that the categorical approach rejects. According to the court of appeals, a "conviction" like petitioner's establishes only the possession of marijuana and the intent to distribute. But the court then indicated that, because the offense might constitute a misdemeanor or a felony, immigration officials could resolve that indeterminacy by conducting an evidentiary hearing into whether the facts of the offense correspond to a misdemeanor. Pet. App. 9a & n.4. The B.I.A. subsequently adopted the same approach, directing immigration judges to consider "any probative evidence" either party might submit, no matter whether that evidence was presented in securing the conviction. *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012).

That ruling squarely conflicts with this Court's precedents by requiring the very fact-finding that the categorical approach forbids. Under the plain statutory text, as confirmed by this Court's precedents, the "*conviction*" – not the *offense* – must correspond to an "aggravated felony." The conviction and the offense will often differ significantly, as most criminal charges are resolved by plea agreements for lesser charges than the facts might have sustained. And a rule authorizing additional fact-finding turns the "conviction" into little more than a placeholder, promptly superseded by whatever evidence the immigration official decides to credit.

As the B.I.A. has itself previously recognized, "[f]or nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008) (emphasis in original); *see also Evanson v. Attorney General*, 550 F.3d 284, 291 (3d Cir. 2008) ("8 U.S.C. § 1227(a)(2)(A)(iii) – the section of the INA that renders an aggravated felon removable – refers to '[a]ny alien who is *convicted* of an aggravated felony' (emphasis added) rather than to any alien who 'has committed' an aggravated felony.").

The significant constraints on the categorical approach reflect that the INA's "illicit trafficking" provision is not a further penalty for the non-citizen's prior drug offense. Rather, as this Court stated

regarding the analogous provisions of the Armed Career Criminal Act, it "focuses upon the special danger created when a particular type of offender" – a "drug trafficker" – remains in this country. *Begay v. United States*, 553 U.S. 137, 141 (2008). The categorical approach considers the "crime as *generally* committed," *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009) (emphasis in original), in "the ordinary case," *James v. United States*, 550 U.S. 192, 208 (2007), in order to "capture all offenses of a certain level of seriousness," *Taylor v. United States*, 495 U.S. 575, 590 (1990).

This Court has accordingly repeatedly rejected the Government's attempts to look beyond the conviction to the facts of the individual offense under the categorical approach. *See, e.g.*, *Taylor*, 495 U.S. at 600-02; *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) ("[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime."); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (courts look "not to the facts of the particular prior case, but rather to the state statute defining the crime of conviction"); *Begay*, 553 U.S. at 141 ("[W]e consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.").

Accordingly, under the categorical approach, "in order to determine whether a prior conviction is for the kind of offense described, the immigration judge must look to the [state] statute," as opposed to "the particular circumstances in which an offender

committed" the crime. *Nijhawan*, 129 S. Ct. at 2297-98. By contrast, the Fifth Circuit's rule "necessarily requires looking into evidence of [petitioner's] actual conduct, evidence that may never have been seen by the initial convicting court. It was the desire to avoid such particular inquiries – whether designed to show that a specific defendant was less or more culpable than what his actual conviction required – that led [this Court] to focus on categorical analysis." *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008).

2. The fact-finding required by the Fifth Circuit's decision gives rise to all the collateral litigation over the nature of the prior offense that this Court's precedents have consistently held is improper. The categorical approach is a "pragmatic" one "that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Shepard v. United States*, 544 U.S. 13, 20 (2005). It responds directly to the "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 601. Relying on the findings necessary to the conviction "avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant's prior crime, as committed on a particular occasion, did or did not" amount to a federal felony. *Chambers v. United States*, 555 U.S. 122, 125 (2009).

In conflict with those cases, the Fifth Circuit's decision compels "collateral trials," relitigating the conduct underlying the predicate conviction. *Shepard*, 544 U.S. at 23. Indeed, here more than in most contexts, "the practical difficulties and potential

unfairness of a factual approach are daunting." *Taylor*, 495 U.S. at 601.

Notwithstanding that the INA requires the Government to prove a non-citizen is removable by "clear and convincing" evidence, 8 U.S.C. § 1229a(c)(3)(A), the Fifth Circuit placed the burden of proof on the non-citizen. Pet. App. 9a. The relevant evidence of drug quantity and the absence of remuneration will often be unavailable to the non-citizen, however. Evidence relating to those facts will not have been introduced in the state criminal proceedings, or otherwise preserved, for the very reason that the conviction leaves those facts indeterminate: they are *irrelevant* under the statute of conviction. The great majority of such cases are in any event resolved by plea agreements. The offense also will often have occurred years or even decades earlier, so memories will have faded and corroborating witnesses dispersed.

If the evidence can be located, it will be hotly disputed. For example, in this case, the Government argued that the police report which petitioner produced from his own case to prove that he had not been convicted of a felony was entitled to no weight, because the report was "not authenticated or sworn." U.S. C.A. Br. 17. With no standard to guide their decisions, immigration judges will reach inconsistent results.

It gets worse. Non-citizens in removal proceedings based on drug convictions are subject to mandatory arrest. 8 U.S.C. § 1226(c)(1)(B). They regularly have no lawyer. The Government often detains them hundreds of miles from home and family in facilities with very little access to mail,

telephones, a library, or computers.[4] For many individuals, it will be impossible to produce the proof that the Fifth Circuit's decision demands.

Assuming the facts could be located, the Fifth Circuit's ruling is still impracticable. Immigration judges already have massive caseloads; the number of pending immigration cases is at an all-time high.[5]

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[4] See generally Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States 14, 19-20 (2011), available at http://www.hrw.org/reports/2011/06/14/costly-move-0; Seattle University School of Law, Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington 37-38 (2008), available at http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf; National Immigration Law Center, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers 41-43, 48 (2009), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CF4QFjAA&url=http%3A%2F%2Fwww.nilc.org%2Fdocument.html%3Fid%3D9&ei=1qPkT-bNMvO20QHhuzXCQ&usg=AFQjCNFDn13giJU8EDMhc2Vcjl5auZLGgg&sig2=8dzDINa8E78F8siS2i9ekw; Lutheran Immigration & Refugee Service & Women's Commission for Refugee Women and Children, Locking Up Family Values: The Detention of Immigrant Families 38 (2007), available at http://www.womensrefugeecommission.org/docs/famdeten.pdf.

[5] See American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 28 (2010), available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf; Transactional Records Access Clearinghouse, Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts,

But the court of appeals imagined that immigration judges would effectively conduct trials of drug charges that were resolved by a different government many years before, hundreds or thousands of miles away. The situation will be worse for front-line immigration officers – and likely still more unfair to non-citizens – who will often be required to make "aggravated felony" determinations without the benefit of adversarial hearings.[6]

C. The Government's Alternative "Elements" Theory Is Meritless.

At the certiorari stage, the Government went even further than the Fifth Circuit, implying that no evidentiary hearing could be conducted because all marijuana distribution offenses are aggravated felonies, without exception. The Solicitor General argued that "[i]n the context of controlled-substances offenses, applying the categorical approach requires the IJ to examine the *elements* of the state offense and determine whether, if a trier of fact found all of

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available at http://trac.syr.edu/phptools/immigration/court_backlog/.

[6] *See, e.g.*, 8 U.S.C. §§ 1101(f)(8) (naturalization officers must determine whether a conviction is an aggravated felony because an aggravated felony conviction is a bar to naturalization), 1226(c)(1)(B) (detention officers make aggravated felony determinations because aggravated felonies trigger mandatory detention), 1228(a)(3)(A) (mandating expedited removal proceedings for detainees convicted of aggravated felonies); 8 C.F.R. § 335.3 (naturalization determinations are typically based on a paper record and a non-adversarial interview).

those elements satisfied, it necessarily also found that the defendant committed the elements of a felony offense under the CSA." BIO 7. On that view, "Section 841(b)(4) is *irrelevant* in using a 'categorical approach' to identify state convictions that constitute CSA felonies," because "[t]hat paragraph does not define any element of any crime." *Id.* 9 (emphasis added). Instead, a conviction involving "[a]ny quantity of marijuana" is categorically an aggravated felony. *Id.* 7 n.5.

That argument cannot be right, conflicts with this Court's precedents, and contradicts the Government's own position in *Carachuri-Rosendo*. It cannot be right because it would mean that a non-citizen convicted in federal court directly under the misdemeanor distribution provision of the CSA would nonetheless be deemed to have committed an aggravated felony for immigration purposes, triggering mandatory deportation. After all, the Government's very point is that Section 841(b)(4) – which defines the misdemeanor – is "irrelevant." So on the Government's view, the INA treats a *misdemeanor* conviction entered directly under the Controlled Substances Act as if it were a "*felony* punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2) (emphasis added). That argument defeats itself.

This Court also rejected the Government's "elements" theory in *Carachuri-Rosendo*. The Solicitor General asserted in that case that "the categorical approach focuses on whether the generic crime [*i.e.*, federal offense] and the predicate crime have the same offense elements, which is essentially the inquiry the government advocates here; a

sentencing factor such as recidivism is not an element that would need to be present under the categorical approach." Br. for U.S., *Carachuri-Rosendo* Br. 28 n.12. On that view, "the facts that make a drug offense 'punishable' as a felony need not have been established in the prior state court proceeding, but only in the later immigration proceeding." *Id.* 29; *see also* Tr. of Oral Arg., *Carachuri-Rosendo* 44 (Assistant to the Solicitor General) ("This is a two-part inquiry where the first part, the offense elements, does need to be established in State court, and the second part, which goes to how it is punishable, does not need to be established in State court.").

This Court disagreed. The Government's two-step theory, it explained, failed to account for the fact that under the categorical approach *all* the facts necessary to establish both the federal offense and its felony status must be reflected in the conviction itself. If the conviction failed to establish that the non-citizen was a recidivist, that was the end of the matter; a further fact-finding stage was inappropriate. 130 S. Ct. at 2586-87.

But the Court separately *accepted* the Government's argument that the "felony" status of the conviction must account for *both* elements and sentencing factors. In *Carachuri-Rosendo*, the Solicitor General explained that a conviction is an aggravated felony if it is a "felony *punishable* under the [CSA]." Br. for U.S., *Carachuri-Rosendo* 16. The word "punishable," in turn, means "deserving of, or liable to, punishment." *Id.* (quoting *Webster's Third New International Dictionary of the English Language* 1843 (1993)). Because the CSA defines

whether a conviction is subject to felony punishment based on sentencing factors, "to determine how an offense is 'punishable' under the CSA, a court must look *beyond the offense elements to sentencing factors* relevant to the particular offender." *Id.* 30 (emphasis added).

This Court agreed. It explained that so long as the predicate conviction included a "finding" of recidivism, the non-citizen's conviction could be "*punishable*" as a felony "under the Controlled Substances Act." *See Carachuri-Rosendo*, 130 S. Ct. at 2586. Thus, an offense is "punishable" as a "felony" under the CSA whenever it is "eligible for" that punishment, *id.* at 2581, which means that "the 'maximum term of imprisonment authorized' must be 'more than one year,'" *id.* at 2586 (quoting 18 U.S.C. § 3559(a)(5)). It makes no difference that "facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as 'elements' in the traditional sense." *Id.* at 2584 (quoting the B.I.A.'s decision).

In this case, the Government now reverses course and argues that only elements are relevant under the categorical approach because "[a] criminal offense is defined by its statutory 'elements.'" BIO 8. But *Carachuri-Rosendo* rejected that argument too, explaining that whether the conviction is "punishable" as a felony does not turn merely on its elements. "While most federal offenses are defined by elements that must be proved to a jury beyond a reasonable doubt," whether a "conviction" is a "felony" under the CSA depends on an "'amalgam of elements, substantive *sentencing factors*, and

procedural safeguards.'" 130 S. Ct. at 2583 (quoting the B.I.A.'s decision) (emphasis added).

Nor is there otherwise support in this Court's decisions for the Government's "elements" theory. While the Court's decisions articulating the "categorical approach" have sometimes loosely referred to the "elements of the offense," it has used that language not to distinguish "sentencing factors" but instead to reinforce that the categorical approach does not consider "the specific conduct of this particular offender." *James v. United States*, 550 U.S. 192, 202 (2007). The focus of the categorical approach has always been on the fact of conviction, and the burden of proof has always been placed on the Government to meet the "demanding requirement" of showing that the conviction itself supports a more serious penalty. *Shepard*, 544 U.S. at 24.[7]

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[7] At the very least, petitioner is entitled to the opportunity to prove that his offense corresponds to the federal misdemeanor. The immigration judge and the B.I.A. held that this case was controlled by B.I.A. precedent holding that all marijuana distribution convictions are *per se* aggravated felonies. *See* Pet. App. 12a, 18a (citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008)). The Fifth Circuit held to the contrary that the non-citizen has the right to prove that his offense corresponds to the misdemeanor provision. Pet. App. 9a. If this Court agrees with that ruling, petitioner should be entitled to that opportunity. Although the Fifth Circuit stated that petitioner waived that right by failing to introduce evidence before the ALJ, *see id.* 9a n.4, even the Government seemingly recognized in its brief below that the B.I.A. had provided petitioner with no such opportunity. U.S. C.A. Br. 17 n.2 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). And while the

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Government noted at the certiorari stage that before the immigration judge "petitioner did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration," BIO 4, it acknowledged that the BIA regarded the misdemeanor provision as irrelevant as a matter of law under the B.I.A.'s "controlling decision in *In re Aruna*," *id.* 5.

If, on the other hand, this Court holds that this case is governed by a "circumstance-specific" approach rather than the "categorical approach," a remand would also be required to consider whether petitioner's conviction is a "controlled substances" offense *at all*. Section 841(b)(4) provides that the distribution of a small amount for no remuneration should be treated as drug possession, and petitioner's offense involved the possession of thirty grams or less of marijuana for personal use. *See* 8 U.S.C. § 1227(a)(2)(B)(i). Under the correct "categorical approach," that argument is precluded, because petitioner was convicted of possession with intent to distribute. But if this Court were to hold instead that this case is governed by a "circumstance-specific" approach, petitioner would be entitled to prove that the facts of his offense fall within the personal-use exception.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

APPENDIX

APPENDIX

Relevant Statutory Provisions

Provisions of the Immigration and Nationality Act

8 U.S.C. § 1101(a)(43) provides:

> The term "aggravated felony" means –
>
> . . .
>
> (B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Conviction
> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(A)(iii) provides:

> Aggravated felony
> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1229a(c)(3)(A) provides:

> In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. § 1229b(a) provides:

> Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

Provisions of the Controlled Substances Act

21 U.S.C. § 841(a) provides:

> Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(D) provides:

> Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)
>
> . . .
>
> (D)
>
> In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more

than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(4) provides:

Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

21 U.S.C. § 844(a) provides:

> Unlawful acts; penalties
>
> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug,

narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this

section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

21 U.S.C. § 924(c)(2) provides:

For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

Provisions of the Georgia Code

Ga. Code § 16-13-2(a) provides:

> Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section

may occur only once with respect to any person.

Ga. Code § 16-13-21(11) provides:

> "Distribute" means to deliver a controlled substance, other than by administering or dispensing it.

Ga. Code § 16-13-30(j)(1) provides:

> It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

Ga. Code § 16-13-31(c) provides:

> Any person who knowingly sells, manufactures, grows, delivers, brings into this state, or has possession of a quantity of marijuana exceeding 10 pounds commits the offense of trafficking in marijuana and, upon conviction thereof, shall be punished as follows:
>
> (1) If the quantity of marijuana involved is in excess of 10 pounds, but less than 2,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of $100,000.00;
>
> (2) If the quantity of marijuana involved is 2,000 pounds or more, but less than 10,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of seven years and shall pay a fine of $250,000.00; and
>
> (3) If the quantity of marijuana involved is 10,000

> pounds or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of $1 million.

Ga. Code § 42-8-60(a) provides:

> Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:
>
> (1) Defer further proceeding and place the defendant on probation as provided by law; or
>
> (2) Sentence the defendant to a term of confinement as provided by law.

Materials From Georgia State Court

Final Disposition

THE SUPERIOR COURT OF HOUSTON COUNTY, GEORGIA

FINAL DISPOSITION

THE STATE VS. ADRIAN PHILLIP MONCRIEFFE

CRIMINAL ACTION NO. 2007 C 38166

OFFENSE(S) COUNT 01

VGCSA – POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

MAY TERM, 2008

☒ PLEA:

☒NEGOTIATED

☒GUILTY ON COUNT(S) ____1____

☐NOLO CONTENDERE ON COUNT(S) _____

☐TO LESSER INCLUDED OFFENSE(S) ___
ON COUNT(S) _____

☒JURY

☐NON-JURY

☐VERDICT:

☐GUILTY ON COUNT(S) _____

☐NOT GUILTY ON COUNT(S) _____

☐GUILTY OF INCLUDED OFFENSE(S) OF _____ON COUNT(S) _____

☒OTHER DISPOSITION:

☒NOLLE PROSEQUI ORDER ON COUNT(S) 2___

☐DEAD DOCKET ORDER ON COUNT(S) _____

☒FIRST OFFENDER TREATMENT

WHEREAS, said defendant has not previously been convicted of a felony nor availed himself of the provision of the First Offender Act (GA. Laws 1968, p.324). NOW, THEREFORE, the defendant consenting hereto, it is the judgment of the Court that no judgment of guilty be imposed at this time, but that further proceeding are deferred and defendant is hereby sentenced to confinement for the period of 0 YEARS and/or placed on probation for the period of 5 YEARS from this date provided that said defendant complies with the following general and special conditions herein imposed by the Court as part of this sentence:

PROVIDED, further, that upon violation of the terms of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of said offense charged. Let a copy of this Order be forwarded to the Office of the State Probation System of Georgia, and the identification Division of the Federal Bureau of Investigation.

☒GENERAL CONDITIONS OF PROBATION

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

☒1) Do not violate the criminal laws of any governmental unit.

☒2) Avoid injurious and vicious habit – especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

☒3) Avoid persons or places of disreputable or harmful character.

☒4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him(her) at home or elsewhere.

☒5) Work faithfully at suitable employment insofar as may be possible.

☒6) Do not change his(her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

☒7) Support his(her) legal dependents to the best of his(her) ability.

☒8) Probationer shall, from time to time upon oral or written request by any Probation Officer, produce a breath, urine, and/or specimen for analysis for the possible presence of a substance prohibited or controlled by any law of the State of Georgia or the United States.

9) Submit to evaluation/testing relating to rehabilitation & participate in & successfully complete rehabilitative programming as directed by Probation Dept.

☒ OTHER CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of 1,000.00 plus $30 or 10%, whichever is less pursuant to O.C.G.A. 15-21-70 and pay restitution in the amount of .00 : 32.00 MO Prob Fee, 50.00 POT, 100.00 IDF 100.00 Jail, 500.00 Drug, 50.00 VAF, .00 BSF, 50.00 CRM Lab, .00 DUI .00 DRVED, .00 LDAP

Special Conditions: DRUG OFFENDER CONDTIONS: BANISHMENT FROM HOUSTON COUNTY EXCEPT TO DRIVE THRU ON 1-75: EARLY TERMINATION AFTER 2 YRS @ DISCRETION OF PROB DEPT: NO POSSESSION OR CONSUMPTION OF ALCHOLIC OR ILLEGAL DRUGS;***

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted, if such probation is revoked, the Court may order the execution of the sentence in the manner provided by law after deducting there from the amount of time the defendant has served on probation. All special conditions imposed this date are pursuant to O.C.G.A. 42-8-34.1 and are, therefore, special conditions. Any vio-

lation(s) of any special conditions may result in a revocation in full. If offense is covered under O.C.G.A., 24-4-60, you must submit a DNA sample.

The defendant was represented by the Honorable SHOD WATSON Attorney at Law HOUSTON County, by (Employment) ([illegible]). By the Court, JUNE 30, 2008

So ordered this 30TH day of JUNE, 2008

/s/ [illegible]
Judge Houston Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he/she instructed regarding the conditions as set forth above.

This 30th day of June, 2008 /s/ Elaine Cranford
Probation Officer

Copy received and instructions regarding conditions acknowledged.

This 30th day of June, 2008 /s/ Adrian Moncrieffe
Probationer

Filed in Open Court, this JUN 30 2008.

/s/ Sandra L [illegible] Deputy Clerk

FINAL DISPOSITION CONTINUATION PAGE
WARRANT NUMBER 2006 MP 55975

THE SUPERIOR COURT OF HOUSTON COUNTY, GEORGIA

THE STATE VS. ADRIAN PHILLIP MONCRIEFFE

CRIMINAL ACTION NO. 2007 C 38166

OFFENSE(S) COUNT 01

VGCSA-POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

***NO POSSESSION OF ANY DRUG PARAPHERNALIA, NO POSSESSION OF ANY SURVIELLANCE EQUIPMANT; NO ILLEGAL DRIVING; TRANSFER PROBATIONTO STATE OF FLORIDA

So ordered this 30th day of JUNE, 2008

/s/ [SIGNATURE]
Judge, Houston Superior Court

IIIB01-0004A02
Attachment 2
3/01/04

ACKNOWLEDGEMENT Of

Prohibition Against Receiving, Shipping, Possessing, Transporting Or Attempting To Purchase a Firearm

/s/ Adrian Phillip Moncrieffe 12-19-80,

(Full name, Please Print) Date of Birth

_____

Social Security Number

acknowledge that I have read, or had read to me, and understand that:

(a) I have been convicted of a felony offense, or

(b) I am currently serving a sentence imposed under First Offender Act for a felony offense, or

(c) I have been convicted of a misdemeanor crime of domestic violence.

and as a result of this action, I am prohibited by Ga. Law (O.C.G.A. 16-11-131 and 42-8-60 through 65) and/or Federal Law (USC: 18 USC 921 through 925) from receiving, shipping, possessing, transporting or attempting to purchase a firearm. This includes any handgun, rifle, shotgun, or other weapon, which will or can be converted to expel a projectile by the action of an explosion or electrical charge. I also acknowledge that if I am a convicted felon, I am prohibited by Federal Law from receiving, shipping, possessing, transporting or attempting to purchase ammunition.

Possession of a firearm or ammunition means that I may not have a firearm or ammunition in my actual physical control (i.e. in my pants pocket) or within my area of access or control (i.e. in the glove box or my car). I may not possess a firearm or ammunition either by myself or jointly with another person.

If I receive, ship, possess, transport, or attempt to purchase a firearm or ammunition I will be guilty of a state and/or federal felony crime.

I understand that this document can be used as evidence in a court of law during probation revocation or criminal proceedings.

/s/ Adrian Moncrieffe — 6/30/08

Signature — Date

/s/ Elaine Cranford — 6-30-08

Witness — Date

PO II

Position or Title

Retain this form in the probationer's file according to Probation Division SOPs IIIB13-0004, IIIB13-0005, and IIIB13-0006.

Revised 1/04

Printed by: George Hartwig

Title: 0604482: Aptiris Unified Office

Wednesday, August 22, 2007 11:00:49 AM

Evidence Description: One small plastic bag, which contains a green leafy substance.

Results: A microscopic examination was conducted on the above-mentioned green leafy material along with a Duquenois-Levine Reagent test and a KN Reagent (Fast Blue B) test resulting in a positive confirmation of the material MARIJUANA.

Material Weight: Less than 1 oz. (approximate weight is 1.3 grams.)

Respectfully Submitted,

Cindy Jackson

Evidence Technician

Perry Police Department

Criminal Investigations Division

Certified Marijuana Identification

RESPONDENT'S BRIEF

No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DONALD E. KEENER
W. MANNING EVANS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Immigration and Nationality Act, a state crime is an "aggravated felony" if it is equivalent to a "felony punishable under the Controlled Substances Act." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under the Controlled Substances Act, possession of an unspecified quantity of marijuana with intent to distribute is a felony punishable by up to five years of imprisonment. 21 U.S.C. 841(b)(1)(D). If the defendant shows that he distributed only "a small amount of marihuana for no remuneration," however, the maximum punishment is one year of imprisonment (absent a recidivist finding). 21 U.S.C. 841(b)(4), 844, 885(a)(1).

The question presented is whether, when a defendant is convicted in state court of possession of marijuana with intent to distribute but the record of conviction does not disclose the quantity of marijuana or the existence of remuneration, the defendant has not been convicted of an "aggravated felony" merely because of the possibility that the offense involved "a small amount of marihuana for no remuneration."

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Cases—Continued: Page

Aruna, In re, 24 I. & N. Dec. 452 (B.I.A. 2008) .. 5, 7, 15, 20
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Cases—Continued: Page

Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 38
Roman v. *Gonzales*, 204 Fed. Appx. 486 (5th Cir. 2006), cert. denied, 549 U.S. 1347 (2007) 34, 38
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United States v. *Bradshaw*, 281 F.3d 278 (1st Cir.), cert. denied, 537 U.S. 1049 (2002) 22
United States v. *Brown*, 276 F.3d 930 (7th Cir.), cert. denied, 537 U.S. 829 (2002) 22
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United States v. *Campbell*, 317 F.3d 597 (6th Cir. 2003) 21
United States v. *Contreras*, 536 F.3d 1167 (10th Cir. 2008), cert. denied, 555 U.S. 1117 (2009) 22
United States v. *Damerville*, 27 F.3d 254 (7th Cir.), cert. denied, 513 U.S. 972 (1994) 26
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United States v. *Eddy*, 523 F.3d 1268 (10th Cir. 2008) ... 21
United States v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 (1st Cir.), cert. denied, 543 U.S. 856 (2004) 21
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United States v. *Guzman-Mata*, 579 F.3d 1065 (9th Cir. 2009) 34, 37

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United States v. *Hamlin*, 319 F.3d 666 (4th Cir. 2003) 21, 22
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In the Supreme Court of the United States

No. 11-702

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 662 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 10a-13a) and the immigration judge (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. The petition for a writ of certiorari was filed on December 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

This case concerns the "aggravated felony" provisions of the Immigration and Nationality Act (INA), which Congress passed to speed removal of certain criminal aliens. An alien previously admitted to the United States who has been "convicted of an aggravated felony" is, among other consequences, removable on that basis and ineligible for cancellation of removal. 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). The "aggravated felony" at issue here incorporates the term "drug trafficking crime," which is defined to include "any felony punishable under the Controlled Substances Act [CSA] (21 U.S.C. 801 *et seq.*)." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under the relevant provision of the CSA, 21 U.S.C. 841(a)(1), a person who possesses a controlled substance with intent to distribute is subject to felony punishment, unless he or she shows that only a "small amount" of marijuana was involved for "no remuneration" (assuming no recidivist determination). 21 U.S.C. 841(b)(1)(D) and (4).

After obtaining lawful permanent residency in the United States, petitioner was convicted under Georgia law of possessing marijuana with intent to distribute. The Department of Homeland Security (DHS) charged petitioner with being removable. The immigration judge found petitioner both removable and ineligible for the discretionary relief of cancellation of removal, on the ground that he was convicted of an offense punishable as a felony under the CSA, *i.e.*, an "aggravated felony." The Board of Immigration Appeals (Board) affirmed. The court of appeals denied a petition for review, relying on the fact that absent a defendant's showing of a small amount of marijuana and no remuneration, the CSA

punishment is a felony-based maximum of five years. Pet. App. 1a-9a.

1. Under the INA, 8 U.S.C. 1101 *et seq.*, an alien who has been admitted to the United States is removable if he is thereafter "convicted of an aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Certain removable aliens may seek the discretionary relief of cancellation of removal, but an alien convicted of an "aggravated felony" is ineligible for that relief. 8 U.S.C. 1229b(a)(3).

The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list qualifies as an aggravated felony, regardless of whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). As relevant here, the list includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the [CSA]," 21 U.S.C. 801 *et seq.* For these purposes, a "felony" is a crime punishable by more than one year of imprisonment. 18 U.S.C. 3559(a)(1)-(5); see *Lopez* v. *Gonzales*, 549 U.S. 47, 56 n.7 (2006).

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits certain acts including "possess[ion] with intent to * * * distribute * * * a controlled substance." The CSA defines "distribute" as, with exceptions not relevant here, "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical." 21 U.S.C. 802(8) and (11). Penalties under the CSA for possessing a controlled substance with intent to distribute vary based on the type and amount of the controlled

substance involved, as well as other factors. See generally 21 U.S.C. 841(b)(1)(A)-(E). If the controlled substance is marijuana and weighs "less than 50 kilograms," the maximum penalty is five years of imprisonment, "except as provided in paragraph[] (4) * * * of this subsection." 21 U.S.C. 841(b)(1)(D). Paragraph (4), in turn, provides that "any person * * * distributing a small amount of marihuana for no remuneration shall be treated as provided in" 21 U.S.C. 844 and another statute not relevant here. 21 U.S.C. 841(b)(4). Section 844 prohibits the simple possession of a controlled substance and, unless the government proves recidivism in the prescribed manner, provides a maximum term of one year of imprisonment for simple possession of marijuana. See 21 U.S.C. 844(a), 851.

The CSA specifies that "[i]t shall not be necessary for the United States to negative any exemption or exception" in the CSA "in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding" under the CSA, and that "the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." 21 U.S.C. 885(a)(1).

2. a. Petitioner is a native and citizen of Jamaica. In 1984, he was admitted to the United States as a lawful permanent resident. Pet. App. 2a, 11a.

In 2008, petitioner pleaded guilty in Georgia state court to one count of possession of marijuana with intent to distribute. Pet. App. 2a-3a, 11a; Administrative Record (A.R.) 83-84; Ga. Code Ann. § 16-13-30(j)(1) (2007).[1]

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[1] Section 16-13-30(j)(1), in pertinent part, makes it unlawful to "possess with intent to distribute marijuana." It has no minimum quantity requirement, and "distribute" means "to deliver a controlled substance, other than by administering or dispensing it." Ga. Code

Although that offense is a felony under Georgia law punishable by up to ten years of imprisonment (Ga. Code Ann. § 16-13-30(j)(2) (2007)), petitioner was sentenced to five years of probation. Pet. App. 2a, 11a.[2]

In 2010, based on that conviction, DHS charged petitioner as an alien removable on two grounds: having been convicted of (1) an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii); and (2) a controlled-substance offense, 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 2a, 15a. Petitioner admitted DHS's factual allegations but disputed whether they made him removable as charged. *Id.* at 16a.

After DHS produced certain conviction documents (A.R. 78, 83-85), the immigration judge ruled that petitioner was removable "as charged." Pet. App. 18a. Citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), the

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Ann. § 16-13-21(11) (2007). Section 16-13-30(j)(2) states that, except as provided in subsections inapplicable here, "any person who violates [Section 16-13-30(j)(1)] shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years."

[2] Petitioner's sentence was imposed under Ga. Code Ann. § 42-8-60(a) (2007), which confers discretion to sentence first-time felony offenders to probation. A.R. 84. (Although petitioner also cites Ga. Code Ann. § 16-13-2 with respect to his sentence, see Pet. Br. 6, 23, that provision—while analogous to Section 42-8-60(a)—applies only to simple possession offenses.) Such dispositions remain convictions for federal immigration purposes under the INA. A judgment is a "conviction" even when "adjudication of guilt has been withheld," if (as relevant here) "the alien has entered a plea of guilty" and "the judge has ordered some form of punishment * * * to be imposed." 8 U.S.C. 1101(a)(48)(A). Thus, "the mere fact that [an alien] was sentenced pursuant to Georgia's First Offender Act does not mean that he lacks a 'conviction' for purposes of the INA." *Ali* v. *U.S. Att'y Gen.*, 443 F.3d 804, 809-810 (11th Cir. 2006). Petitioner does not contend otherwise here. See Pet. Br. 6 n.2.

immigration judge determined that petitioner's Georgia conviction for possession of marijuana with intent to distribute "corresponds with 21 U.S.C. § 841(a)(1)" and thus "would be punishable as a federal felony." Pet. App. 18a. During proceedings to determine whether petitioner was removable, petitioner (represented by counsel throughout the process) did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration, as might be relevant under 21 U.S.C. 841(b)(4). During separate earlier proceedings concerning bond, petitioner apparently submitted a document purporting to establish drug quantity, but not the absence of remuneration. A.R. 25, 37; see 8 C.F.R. 1003.19(d) (bond proceedings "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding").[3]

b. Petitioner appealed to the Board. He challenged the "aggravated felony" ground of removability, contending (*inter alia*) that he had established, during the bond proceedings before the immigration judge, that his Georgia conviction involved a small amount of marijuana. He did not point to any evidence regarding remuneration or challenge the separate controlled substance ground of removability. See A.R. 16-26.

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[3] The immigration judge's bond decision did not mention the document relating to drug quantity (see A.R. 66), but petitioner's appeal brief to the Board stated that he submitted "certified copies of [petitioner's] Georgia conviction" at the bond hearing and that the document is "[p]art of the record of conviction" (A.R. 25). In any event, petitioner did not offer or cite the document in the proceedings to determine his removability until he filed it with the Board. A.R. 37. Neither the amount of marijuana involved in petitioner's Georgia conviction nor the lack of remuneration was established during the removal proceedings.

The Board dismissed petitioner's appeal. Pet. App. 10a-13a. The Board explained that "[a] state offense constitutes a felony punishable under the [CSA]," and therefore an aggravated felony, "if it proscribes conduct punishable as a federal felony" under the CSA. *Id.* at 11a-12a (citing *Lopez*, *supra*). In this case, the Board held, petitioner's Georgia offense of possession with intent to distribute marijuana was "analogous to the federal offense of possession of marihuana with intent to distribute"—a felony. *Id.* at 12a.

The Board rejected petitioner's argument that his Georgia offense was not an "aggravated felony" because the elements of the offense could encompass some conduct that, in federal court, might be punished as a misdemeanor based on the sentencing provision of 21 U.S.C. 841(b)(4). Pet. App. 12a-13a. The Board relied on its controlling decision in *In re Aruna*, *supra*, which had previously considered and rejected that argument. *Id.* at 13a.

3. The court of appeals denied a petition for review. Pet. App. 1a-9a.[4]

At the outset of its analysis, the court of appeals stated that it "uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA" and, specifically, "whether the elements of the state statute are analogous to a federal felony." Pet. App. 5a. Possession of a controlled substance with intent to distribute is a felony under the CSA, *id.* at 6a, and the court of appeals reasoned that the existence of the mitigating exception in 21 U.S.C. 841(b)(4) for certain marijuana cases does not change that default felony

[4] The court of appeals noted that the "BIA did not rule on, and we do not consider, whether the Georgia conviction constituted a 'controlled substances' violation for purposes of removal." Pet. App. 3a n.2.

status. The court of appeals noted that under its precedent in criminal sentencing cases, when the controlled substance is marijuana but there is no evidence of drug quantity, the offense is a felony with a maximum term of five years of imprisonment—not a misdemeanor with a maximum term of one year. Pet. App. 7a-8a (citing 21 U.S.C. 841(b)(1)(D)). Only when the defendant in a criminal prosecution carries the burden of producing evidence that the mitigating exception applies can the conviction be treated as a misdemeanor. *Id.* at 8a. The court thus joined the First and Sixth Circuits in holding that evidence of drug quantity or remuneration is not necessary for a state conviction for possession with intent to distribute marijuana to be treated as a "felony punishable under the [CSA]." See *id.* at 6a-7a (citing *Garcia* v. *Holder*, 638 F.3d 511, 516 (6th Cir. 2011), petition for cert. pending, No. 11-79 (filed July 18, 2011); *Julce* v. *Mukasey*, 530 F.3d 30, 34-36 (1st Cir. 2008)).

Stating that petitioner bore the burden of proving that his conviction involved only a small amount of marijuana for no remuneration, but that he had not properly offered any evidence on the matter in immigration court, the court of appeals sustained the finding that he was removable as an aggravated felon. Pet. App. 9a & n.4.[5]

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[5] After the filing of the petition for a writ of certiorari, the Board issued a precedential decision making clear that an alien has the opportunity in immigration court to show that Section 841(b)(4)'s mitigating exception applies—*i.e.*, that the prior conviction involved distribution of (or possession with intent to distribute) only a small amount of marijuana for no remuneration—thereby defeating "aggravated felony" treatment. See *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012) (citing, *inter alia*, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009)).

SUMMARY OF ARGUMENT

Petitioner's Georgia conviction for possessing with intent to distribute marijuana qualifies as an "aggravated felony" because it necessarily included all the elements of an offense constituting a "felony punishable under the [CSA]." An alien can avoid "aggravated felony" treatment if he affirmatively proves that his marijuana conviction involved distribution of only a small amount of marijuana for no remuneration, but the existence of that mitigating exception does not alter the felony determination under the categorical approach where the alien has not shown that he falls within the exception.

A. "[A] state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Lopez* v. *Gonzales*, 549 U.S. 47, 57 (2006). The elements of the CSA felony at issue are the knowing possession of marijuana and the specific intent to distribute it; no proof of minimum quantity or remuneration is required. 21 U.S.C. 841(a)(1) and (b)(1)(D). Because petitioner's Georgia conviction necessarily established that he knowingly possessed marijuana with the specific intent to distribute it, that conviction constitutes an "aggravated felony" under the categorical approach.

B. 1. Although the punishment for a Section 841(a)(1) conviction can be reduced to a maximum of one year if the defendant affirmatively establishes that his crime involved distribution of only a "small amount of marihuana for no remuneration," 21 U.S.C. 841(b)(4), Section 841(b)(4) is only a mitigating exception. *E.g.*, *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.). There is no requirement that the government negate the possibility of a "small amount" of

marijuana and no remuneration before a defendant can be convicted of marijuana distribution-related offenses under the CSA and be subject to felony punishment. Because neither drug quantity nor remuneration is an element of the CSA offense, neither is properly considered part of that "generic offense" for purposes of determining, under the categorical approach, whether a state drug conviction is an aggravated felony.

2. According to petitioner, a state marijuana distribution-related conviction constitutes an "aggravated felony" only if it necessarily rules out that the alien distributed a "small amount of marihuana for no remuneration." But the vast majority of state marijuana-distribution laws do not require proof of remuneration or more than a "small amount" of marijuana. Even states that make marijuana trafficking a separate offense also punish under less serious offenses, which do not differentiate based on quantity, the many cases involving more than a "small amount" but less than an amount sufficient to trigger the trafficking charge. See pp. 29-30 & nn.17-18, *infra* (surveying state laws). Given Congress's obvious purpose to ensure the removal of criminal aliens, it would not have intended the drug-trafficking "aggravated felony" provision "to apply in so limited and so haphazard a manner." *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009). And petitioner's approach would create similar problems in other contexts where the generic offense contains narrow, fact-specific exceptions or defenses. See *Gil* v. *Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (rejecting argument that categorical approach requires predicate state-law conviction to negate "antique firearms" exception to trigger removability under 8 U.S.C. 1227(a)(2)(C)).

3. Section 841(b)(4), however, is not irrelevant to the overall analysis: any risk that an alien who distributed a "small amount of marihuana for no remuneration" would be removed as an "aggravated felon" is alleviated by Board precedent allowing aliens to prove that Section 841(b)(4)'s exception applies in a specific case. *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012). That subsequent, "circumstance-specific" inquiry does not contravene the categorical approach but rather operates outside of it, *Nijhawan*, 557 U.S. at 40-42, and addresses any concern that the decision below would produce unintended or unfair results.

C. The decision below is fully consistent with *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010). The Court there held that when a defendant is convicted of simple possession in state court, his state-law crime is equivalent to the federal offense of simple possession (a CSA misdemeanor), not recidivist possession (a CSA felony), even if evidence outside the record could establish in immigration court that he was a recidivist. *Id.* at 2586-2589. In that case, the government, in order to support a CSA felony, would have had to separately establish recidivism because the state conviction itself did not do so. Here, by contrast, no finding beyond the elements of petitioner's Georgia conviction is necessary to establish a CSA felony. *Carachuri-Rosendo* thus does not support the broad proposition that mitigating exceptions or affirmative defenses should be considered part of the generic offense for purposes of the categorical approach.

D. Neither the rule of lenity nor petitioner's argument that ambiguities should be construed in favor of an alien facing deportation suggests a different result. The relevant provisions of the CSA are clear: possession

with intent to distribute marijuana is punishable as a felony, without proof of remuneration or quantity, neither of which is an offense element. It is also clear that Congress would not have wanted criminal aliens to evade "aggravated felony" treatment whenever (as is often the case) a predicate state offense does not require proof of remuneration or more-than-a-small amount of marijuana.

ARGUMENT

PETITIONER'S STATE CONVICTION FOR POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE CONSTITUTES A CONVICTION FOR A FELONY PUNISHABLE UNDER THE CSA

Under the INA, an alien is removable and ineligible for cancellation of removal if he has been "convicted of any aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). Congress defined "aggravated felony" to encompass any "felony punishable under the [CSA]." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). A person, like petitioner, who has been convicted of possession with intent to distribute marijuana is punishable as a felon under the CSA. 21 U.S.C. 841(a)(1) and (b)(1)(A)-(E); 18 U.S.C. 3559(a)(1)-(5). Petitioner does not dispute that the federal government would have to prove nothing more than the elements of the state offense of which he was convicted to obtain a felony conviction under the CSA. That is all that the categorical approach requires to establish that a state conviction is an "aggravated felony."

Nevertheless, relying on the CSA's mitigating exception for cases involving distribution of a "small amount of marijuana for no remuneration," petitioner argues that the state offense of which he was convicted cannot

qualify as an "aggravated felony" because the state offense does not require either remuneration or a minimum quantity. Such a result cannot be squared with the statutory text, this Court's precedents, or Congress's goal of removing aliens convicted of drug dealing. That is not to say the CSA's mitigating exception is of no aid to criminal aliens: although it does not factor into the threshold inquiry under the categorical approach, an alien can defeat an "aggravated felony" determination by producing evidence and carrying his burden of proof in immigration court that the exception applies to his state conviction. But the mere existence of the possible exception, without any proof by the alien that he comes within it, does not automatically confer a free pass from "aggravated felony" treatment for an alien convicted of distributing marijuana under the clear majority of state laws that require neither remuneration nor more than a "small amount."

A. Because the Elements Of The State Offense Correspond To The Elements Of The CSA Felony, Petitioner's Offense Of Conviction Is Presumptively An "Aggravated Felony" Under The Categorical Approach

1. The categorical approach focuses on the elements of the respective offenses

The question here is whether, upon being convicted in Georgia of possession with intent to distribute marijuana, petitioner was convicted of a "felony punishable under the [CSA]." 8 U.S.C. 1101(a)(43); 18 U.S.C. 924(c)(2). A state drug crime is a "felony" for these purposes (whether or not it is classified as a felony under state law) if it corresponds "to a crime punishable as a felony under the federal Act." *Lopez* v. *Gonzales*, 549 U.S. 47, 55 (2006).

As in related contexts, courts considering whether an offense constitutes an "aggravated felony" have used a "categorical approach," *i.e.*, comparing the elements of the offense of conviction, rather than the particular facts of the crime that led to the conviction, to the elements of the relevant "generic" crime (here, the CSA offense). See *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) ("If the elements of the offenses establish that [the aliens] committed crimes involving fraud or deceit, then the first requirement of [the aggravated felony] is satisfied" under the categorical approach.); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007) ("[A] state conviction qualifies as a burglary conviction * * * as long as it has the 'basic elements' of 'generic' burglary.") (quoting *Taylor* v. *United States*, 495 U.S. 575, 599 (1990)); *James* v. *United States*, 550 U.S. 192, 202, 214 (2007) ("[W]e consider whether the *elements of the offense* are of the type that would justify its" qualification as a "violent felony" under the Armed Career Criminal Act.); *Shepard* v. *United States*, 544 U.S. 13, 19 (2005) ("[T]he categorical approach * * * refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes.") (second brackets in original).[6]

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[6] In the immigration context, the Board has generally applied its own similar categorical analysis, independent of this Court's line of cases originating with *Taylor*, *supra*. See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008). Although not at issue here, in 2008 the Attorney General adopted a more flexible approach for crimes involving moral turpitude, allowing for examination of additional evidence if both a categorical analysis and a modified categorical analysis fail to resolve whether an offense is one of moral turpitude. See *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008).

In the context of the drug-trafficking "aggravated felony," applying the categorical approach requires an immigration judge to determine whether the elements of the predicate offense of conviction correspond to the elements of a felony offense under the CSA. See, *e.g.*, *In re Aruna*, 24 I. & N. Dec. 452, 456 (B.I.A. 2008) ("The present aggravated felony determination is subject to the 'categorical approach,' meaning that the 'elements' of the [alien's] predicate offense must correspond to the 'elements' of an offense that carries a maximum term of imprisonment of more than 1 year under the CSA."). In other words, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Lopez*, 549 U.S. at 57.[7]

Although petitioner strains to dismiss those established Court precedents as sometimes "loosely refer[ring]" to offense elements (Pet. Br. 41), he fails to cite a single countervailing precedent holding that mitigating sentencing factors, exceptions, or affirmative defenses are properly considered part of the generic crime (here, the CSA offense) for purposes of the categorical approach. Instead, petitioner cites *Carachuri- Rosendo*

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[7] A predicate offense can sometimes be found to correspond to the relevant "generic" offense even if the predicate offense is broader (*i.e.*, proscribes more conduct) than the generic offense. Under the "modified categorical approach," a limited set of documents from the conviction record can be used to determine whether the particular defendant was actually convicted in a manner corresponding to the generic offense. See, *e.g.*, *Duenas-Alvarez*, 549 U.S. at 187; *Shepard*, 544 U.S. at 26. Under the government's view, however, the modified categorical approach has no role in this case because the Georgia offense (possession with intent to distribute marijuana) of which petitioner was convicted is not broader than the corresponding CSA offense under the categorical approach, notwithstanding Section 841(b)(4)'s exception. See pp. 18-23, *infra*.

v. *Holder*, 130 S. Ct. 2577 (2010), for the proposition that "whether a 'conviction' is a 'felony' under the CSA depends on an 'amalgam of elements, substantive *sentencing factors*, and procedural safeguards.'" Pet. Br. 40-41 (quoting 130 S. Ct. at 2583 (quoting *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 389 (B.I.A. 2007))). But that phrase appears only in the background section of the Court's opinion quoting the *Board's* decision in that case in explaining particular features of recidivist possession under the CSA. 130 S. Ct. at 2583. The Court never ratified that proposition in its own discussion, and, in any event, the recidivism factor at issue in *Carachuri-Rosendo* is readily distinguishable from the type of mitigating exception at issue here. See pp. 40-43, *infra*.

2. The elements of petitioner's state conviction correspond to the elements of a CSA felony

Marijuana is a schedule I controlled substance under the CSA. 21 U.S.C. 802(6); 21 C.F.R. 1308.11(d)(23). Possession of marijuana with intent to distribute is generally a felony under the CSA because it is punishable by imprisonment for more than one year. 21 U.S.C. 841(b)(1)(D). See pp. 3-4, *supra*. The elements of that offense are established if the defendant knowingly and intentionally possesses marijuana with the specific intent to distribute it. See *United States* v. *Burch*, 156 F.3d 1315, 1324 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999). No proof of minimum quantity or remuneration is required.[8] Although a conviction can be treated

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[8] "Distribute" means "the actual, constructive, or attempted transfer of a controlled substance" except in certain authorized circumstances, 8 U.S.C. 802(8) and (11), and "need not be for remuneration or profit." *United States* v. *Durham*, 464 F.3d 976, 981 n.7 (9th Cir. 2006). Any quantity of marijuana suffices to establish the felony, although quan-

as a misdemeanor under the CSA if the defendant establishes that his crime involved distribution of only a "small amount of marihuana for no remuneration," 21 U.S.C. 841(b)(4), that is a mitigating sentencing factor outside the elements of the offense. See pp. 18-23, *infra*.

As the Board and immigration judge determined below (Pet. App. 12a-13a, 18a), the elements of petitioner's Georgia conviction correspond exactly to the elements of the federal offense. See note 1, *supra*; see also *Hardeman* v. *State*, 453 S.E.2d 775, 775 (Ga. Ct. App. 1995) (referring to elements of state offense as possession and specific intent to distribute); *Allen* v. *State*, 324 S.E.2d 521, 526 (Ga. Ct. App. 1984) (possession must be knowing). Because petitioner was convicted of all the elements necessary to establish a felony offense under the CSA, his Georgia conviction is for an "aggravated felony" under the categorical approach.

B. Section 841(b)(4)'s Mitigating Exception Does Not Alter Application Of The Categorical Approach, But Does Allow The Alien To Avoid An "Aggravated Felony" Determination By Proving The Exception Applies

Petitioner contends that the existence of 21 U.S.C. 841(b)(4) precludes a determination under the categorical approach that he was convicted of a "felony punishable under the CSA." In particular, he argues that because the Georgia offense could theoretically cover possession with intent to distribute only a small quantity of marijuana for no remuneration, a conviction under that statute can never itself serve as the basis for an "aggravated felony" determination. Pet. Br. 18-20.

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tities of 50 kilograms or more trigger greater penalties. Compare 21 U.S.C. 841(b)(1)(D) with 21 U.S.C. 841(b)(1)(A)(vii) and (B)(vii).

Petitioner is incorrect. First, the categorical approach turns on the elements of a crime, and neither drug quantity nor remuneration is an element of the CSA felony. Second, in light of the fact that the vast majority of States (like Georgia) do not require remuneration or more than a "small amount" to make unlawful the distribution of marijuana, accepting petitioner's view would seriously undermine Congress's efforts to treat convicted alien marijuana dealers as aggravated felons. Petitioner's view would also pose a similar threat where Congress has attached immigration or sentencing consequences based on other statutes with narrow, fact-specific exceptions or affirmative defenses. Third, any risk that an alien who actually distributed a "small amount of marijuana for no remuneration" would be removed as an "aggravated felon" is alleviated by the Board's precedent allowing an alien to proffer evidence that Section 841(b)(4)'s exception applies in a specific case.

1. Neither drug quantity nor remuneration is an element of the CSA offense

Section 841(b)(1)(D) provides that a person convicted of possession with intent to distribute less than 50 kilograms of marijuana is subject to a term of imprisonment of up to five years, "except as provided" in Section 841(b)(4). Section 841(b)(4), in turn, states, in pertinent part, that "any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided" in 21 U.S.C. 844 (proscribing simple possession of controlled substances). Sections 841(b)(1)(D) and (4) thus allow a defendant, absent a recidivist finding, to have his offense treated as a simple-possession offense subject to

a maximum one-year sentence if he shows that he distributed only a small amount of marijuana for no remuneration.[9] Because Section 841(b)(4) undisputedly does not impose additional offense elements, but instead provides for *mitigation* of the sentence if the defendant carries his burden of proving that he comes within the exception, it does not alter application of the categorical approach in this context.

A criminal offense is defined by its statutory "elements," which consist of the facts that, absent a valid waiver, must be proved to a jury beyond a reasonable doubt to convict a defendant of the offense. See *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477-478, 490 (2000) ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). As explained above, cases that apply the categorical approach to sentencing-enhancement or aggravated-felony classifications limit the inquiry to the "elements" of the respective offenses. See pp. 14–15, *supra*; see also, *e.g.*, *Lopez*, 549 U.S. at 57 (holding that "a state offense whose *elements* include the *elements* of a felony punishable under the CSA is an aggravated felony") (emphasis added).

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[9] If the government follows the requisite procedures for establishing that the defendant is a recidivist, the maximum punishment exceeds one year of imprisonment. See 21 U.S.C. 844(a), 851. In that scenario, application of Section 841(b)(4) does not lead to misdemeanor treatment. Accordingly, in cases in which a defendant is charged and convicted as a recidivist drug offender under state law, "aggravated felony" status follows even under petitioner's view of the categorical approach. See *Carachuri-Rosendo*, 130 S. Ct. at 2585 n.10, 2587 n.12.

Section 841(b)(4) is not relevant when using the categorical approach to identify, as a threshold matter (see pp. 35-39, *infra*), whether a state conviction for marijuana distribution-related conduct constitutes a CSA felony. That paragraph does not define any element of any offense under the CSA. Rather, possession of marijuana with intent to distribute is the pertinent CSA offense, 21 U.S.C. 841(a), and the maximum penalty for violation of subsection (a) involving an unspecified amount of marijuana is five years, 21 U.S.C. 841(b)(1)(D). Although Section 841(b)(1)(D) expressly accounts for Section 841(b)(4), the latter provision is only a "mitigating exception" to the otherwise applicable sentencing provision. *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.); see *Aruna*, 24 I. & N. Dec. at 457 (noting that Section 841(b)(4) does not define separate offense "elements" but is just a "mitigating exception").

Even petitioner acknowledges, as he must, that the crime under the CSA of distributing (or possessing with intent to distribute) marijuana—even without any proof of amount or remuneration—is a felony. See Pet. Br. 24 (Under the CSA, "distribution of marijuana is a felony."). As petitioner further acknowledges, only "*if the defendant proves* he distributed only a small amount for no remuneration" does Section 841(b)(4)'s lower sentencing provision apply. *Ibid.* (emphasis added). The alternative—treating the terms of Section 841(b)(4) as elements of a felony offense—is untenable. If a provision lowering an otherwise applicable maximum sentence for a subset of offenses meant that the prosecution had to negate the provision's applicability in every case, such a rule "would largely prohibit Congress from establishing facts in mitigation of punishment[;] * * * any

attempt to do so would necessarily result in having to submit to the jury the question of the *negating* of these mitigating facts in order to support a punishment greater than that prescribed in the mitigating provision." *United States* v. *Campbell*, 317 F.3d 597, 603 (6th Cir. 2003) (quoting *Outen*, 286 F.3d at 638); see also *Dixon* v. *United States*, 548 U.S. 1, 13 (2006) ("[A]n indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and it is incumbent on one who relies on such an exception to set it up and establish it.") (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); 21 U.S.C. 885(a)(1) ("It shall not be necessary for the United States to negative any exemption or exception set forth in [the CSA] * * * , and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.").

For that reason, every court of appeals to have considered the question has held that, for *Apprendi* purposes, the statutory maximum penalty for possession of an unspecified amount of marijuana with intent to distribute is five years (under Section 841(b)(1)(D)), not one year (under Section 841(b)(4))—indicating that Section 841(b)(4) does not define the elements of any independent crime. See *United States* v. *Hamlin*, 319 F.3d 666, 670-671 (4th Cir. 2003); *Campbell*, 317 F.3d at 603; *United States* v. *Walker*, 302 F.3d 322, 324 (5th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1222 (2003); *Outen*, 286 F.3d at 638-639; see also *United States* v. *Eddy*, 523 F.3d 1268, 1271 (10th Cir. 2008) (Section 841(b)(4) does not create a lesser-included offense of Section 841(b)(1)(D)); *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 53 (1st Cir.) (endorsing

Outen's analysis in the context of another statute with a mitigating exception), cert. denied, 543 U.S. 856 (2004).[10]

As a result, a federal jury can convict a defendant of the felony of possession of marijuana with intent to distribute under the CSA, without needing to find beyond a reasonable doubt that the amount was "not small" or that there was remuneration. Likewise, a court can accept a plea of guilty to felony possession of marijuana with intent to distribute under the CSA, without needing to find a factual basis to conclude that the amount was "not small" or that there was remuneration. And the mere absence of evidence on those points does not cap the defendant's sentence at one year. See *Hamlin*, 319 F.3d at 670-671; *Campbell*, 317 F.3d at 601-603; *United States* v. *Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002), cert. denied, 537 U.S. 1177 (2003); *Walker*, 302 F.3d at 323-324; *Outen*, 286 F.3d at 625-626, 635-636, 639. In short, there is no requirement that the trier of fact rule out the conditions of a "small amount of marihuana" and "no remuneration," to which Section 841(b)(4) refers, before a defendant can be convicted of a marijuana distribution-related offense under 21 U.S.C. 841(a)(1) and be subject to felony punishment under 21 U.S.C.

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[10] Case law from other contexts, including the affirmative "defense" provision of the federal three-strikes law (18 U.S.C. 3559(c)(3)(A)), also makes clear that *Apprendi* does not apply to affirmative sentencing-mitigation factors. See, *e.g.*, *United States* v. *Snype*, 441 F.3d 119, 150 (2d Cir. 2006) ("[A] paradigm that allows the defendant to raise an affirmative defense during the sentencing phase of criminal proceedings, but then shifts the burden of proof to him to establish the defense, does not violate due process.") (quoting *United States* v. *Bradshaw*, 281 F.3d 278, 295 (1st Cir.), cert. denied, 537 U.S. 1049 (2002)); accord *United States* v. *Contreras*, 536 F.3d 1167, 1174 (10th Cir. 2008), cert. denied, 555 U.S. 1117 (2009); *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.), cert. denied, 537 U.S. 829 (2002).

841(b)(1)(D). Rather, to obtain the one-year maximum under Section 841(b)(4), the defendant himself must affirmatively establish that the mitigating exception applies. See, *e.g.*, *Outen*, 286 F.3d at 638; see also *Apprendi*, 530 U.S. at 491 n.16 (referring to "the defendant * * * showing" facts in mitigation of punishment).

Accordingly, at least when the record of a state conviction for possession with intent to distribute marijuana is silent as to drug quantity or remuneration, the proper federal analogue is a conviction subject to the five-year maximum sentence under Section 841(b)(1)(D). That makes the conviction one for a "felony punishable under the [CSA]" and, therefore, an aggravated felony.

2. Invoking exceptions such as Section 841(b)(4) to categorically preclude "aggravated felony" determinations would substantially undermine the statutory purpose

a. Congress intended the "aggravated felony" provision to apply broadly to render removable and bar immigration benefits for criminal aliens engaging in marijuana distribution

Starting in 1988, Congress responded to the serious threat to public safety and the substantial drain on societal resources posed by criminal aliens by making any alien convicted of an "aggravated felony" subject to removal and ineligible for certain immigration benefits. Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, §§ 7342-7349, 102 Stat. 4469-4473; see, *e.g.*, H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-8 (1995). In particular, the "aggravated felony" provision at issue here, which despite its label has always extended beyond trafficking crimes (ADAA § 6212, 102 Stat. 4360), embodies Congress's determination that the involvement of

aliens in drug crimes presents an especially "difficult and dangerous problem." *Illegal Alien Felons: A Federal Responsibility, Hearing Before the Subcomm. on Federal Spending, Budget, & Accounting of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1 (1987). Moreover, the CSA reflects Congress's long-standing judgment that marijuana distribution (whether called trafficking or not) generally warrants felony punishment. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 401(a)(1), (b)(1)(B) and (4), 84 Stat. 1260-1262. There is little reason to believe that Congress nevertheless intended to retain the eligibility for special relief from removal of an alien who was convicted of possessing with intent to distribute marijuana without any proof that the intended distribution was of a small amount and non-remunerative.

Under petitioner's view, however, the categorical approach precludes treating a state-law conviction for distributing or possessing with intent to distribute marijuana as an "aggravated felony," irrespective of drug quantity and illicit gain, unless state law requires a finding of remuneration or more than a "small amount." *E.g.*, Pet. Br. 10. Applying the categorical approach in that manner would curtail the reach of "aggravated felony" (and similar) provisions far more than Congress could have intended. That consequence further counsels against considering the requirements of Section 841(b)(4) (and other similar exceptions or affirmative defenses) as part of the "generic" offense for purposes of the categorical approach. See *Nijhawan* v. *Holder*, 557 U.S. 29, 39-40 (2009).

The "aggravated felony" at issue in *Nijhawan* was defined as "an offense that . . . involves fraud or deceit

in which the loss to the victim or victims exceeds $10,000." 557 U.S. at 32 (quoting 8 U.S.C. 1101(a)(43)(M)(i) (emphasis added by Court)). The Court faced the question whether the italicized loss factor must be an element of the prior fraud or deceit offense of conviction to trigger "aggravated felony" treatment. *Ibid.* In answering no, the Court relied in part on the fact that only eight States had fraud or deceit statutes with a $10,000 loss threshold—meaning that fraud or deceit convictions in the other 42 states would not ordinarily give rise to an aggravated felony if the categorical approach were applied.[11] See *id.* at 40. The Court "d[id] not believe Congress would have intended [the aggravated-felony provision] to apply in so limited and so haphazard a manner." *Ibid.*; see also *United States* v. *Hayes*, 555 U.S. 415, 427 (2009) (deeming it "highly improbable that Congress meant to extend [18 U.S.C.] 922(g)(9)'s firearm possession ban [for persons previously 'convicted' of a 'misdemeanor crime of domestic violence'] only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense"). As discussed below, the same is true here.[12]

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[11] Thirteen of the states had statutes with loss thresholds "significantly higher" than $10,000, so at least some fraud or deceit convictions in those states (in addition to the eight other states) would qualify as an "aggravated felony." *Nijhawan*, 557 U.S. at 40.

[12] In *Nijhawan*, the Court referred to the drug-trafficking "aggravated felony" at issue here as one that "must refer to generic crimes." 557 U.S. at 37. That statement simply supports applying the categorical approach in a way that compares the state-law conviction to the elements of the relevant CSA felony offense, *i.e.*, possession of marijuana with intent to distribute (see 21 U.S.C. 841(a) and (b)(1)(D)); it does not imply that mitigating conditions in Section 841(b)(4), which were not mentioned in *Nijhawan*, are part of the "generic crime."

b. Only a small minority of States require proof of remuneration and more-than-a-small amount for a marijuana distribution conviction

A minority of States (up to 15) treat separately—either through a lower sentencing provision/exemption similar to Section 841(b)(4) or through a distinct offense—distribution of a "small amount"[13] of marijuana for no remuneration.[14] Aliens convicted and sentenced

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[13] The CSA does not define "small amount," "indicating that the determination should not be based purely on weight." *United States* v. *Damerville*, 27 F.3d 254, 259 (7th Cir.), cert. denied, 513 U.S. 972 (1994). The contextual nature of the "small amount" requirement substantiates the appropriateness of a circumstance-specific inquiry outside the categorical approach with respect to Section 841(b)(4). See pp. 35-39, *infra*. The Board has suggested, however, that 30 grams (a little over one ounce) "serve[s] as a useful guidepost." *In re Castro Rodriguez*, 25 I. & N. Dec. 698, 703 (B.I.A. 2012). Although courts have concluded that amounts less than 30 grams constitute more than a "small amount," see *Damerville*, 27 F.3d at 258-259 (17.2 grams not "small amount" in prison context), this brief uses 30 grams as a benchmark of "small amount" for purposes of describing relevant state laws unless otherwise noted. See Center on the Administration of Criminal Law, New York University School of Law Amicus Br. 4 n.3 (NYU Amicus).

[14] One of the amici supporting petitioner lists 10 state penal code provisions encompassing solely Section 841(b)(4) conduct. See NYU Amicus Br. 4 n.4 (citations omitted). Our search turned up 15 such provisions. See Cal. Health & Safety Code § 11360(b) (gift of 28.5 grams or less is a misdemeanor); Colo. Rev. Stat. Ann. § 18-18-406(5) (2 ounces or less for no consideration is a petty offense); Fla. Stat. Ann. § 893.13(2)(b)(3) (20 grams or less for no consideration is a misdemeanor); 720 Ill. Comp. Stat. 550/3, 550/4, 550/6 ("casual delivery"—delivery of 10 grams or less without consideration—is a misdemeanor); Iowa Code Ann. § 124.410 (less than one-half ounce for no consideration is a misdemeanor); Minn. Stat. Ann. § 152.027(4)(a) (42.5 grams or less for no remuneration is a petty misdemeanor); N.M. Stat. Ann. § 30-31-22(E) ("a small amount" for no remuneration is a petty misdemeanor);

under those provisions would not face "aggravated felony" treatment. See pp. 35-39, *infra*. Congress reasonably could have expected Section 841(b)(4) to affect the "aggravated felony" designation in that limited way.[15]

That leaves the many other marijuana-distribution offenses both in those States and in all the other States. Only a small number of States (9-11) have provisions requiring remuneration as an element with respect to distribution or possession with intent to distribute mari-

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N.Y. Penal Law § 221.35 (2 grams or less for no consideration is a misdemeanor); N.C. Gen. Stat. § 90-95(b)(2) (less than 5 grams for no remuneration does not constitute unlawful delivery); Ohio Rev. Code Ann. § 2925.03(C)(3)(h) (gift of 20 grams or less is a minor misdemeanor); Or. Rev. Stat. § 475.860(3) (less than 1 ounce for no consideration is a misdemeanor; less than 5 grams for no consideration is a violation); 35 Pa. Stat. Ann. § 780-113(a)(31) (distribution but not sale of 30 grams or less is a misdemeanor); S.D. Codified Laws § 22-42-7 (less than one-half ounce with no consideration is a misdemeanor); Tex. Health & Safety Code Ann. § 481.120(b)(1) (one-fourth ounce or less for no remuneration is a misdemeanor); W. Va. Code Ann. § 60A-4-402(c) (less than 15 grams without any remuneration as a first-time offense may result in probation).

These statutory provision were largely the same when the ADAA was passed in 1988. Missouri also had such a provision, but Iowa did not at that time. See Mo. Rev. Stat. § 194.200(1)(c) (1988); Iowa Code Ann. § 204.410 (1988).

[15] If an alien in one of those States were instead convicted of distributing marijuana under a different provision providing for harsher penalties, it would create the natural inference that the alien did not qualify for lesser punishment for distributing only a small amount of marijuana for no remuneration. See Gov't Br. in Opp. 20 & n.17, *Garcia* v. *Holder*, No. 11-79, petition for cert. pending (filed July 18, 2011). But, under petitioner's view, that would make no difference (unless the offense of conviction explicitly required remuneration and more than a small amount). There is no reason to believe that Congress intended to allow such an alien to evade the reach of the Act's "aggravated felony" provision.

juana, and even those States (with the exception of Arkansas) have other related provisions not requiring remuneration.[16] Except for convictions under the relevant provisions from those select States, the government would never be able to rely on the elements of an alien's offense of conviction to negate Section 841(b)(4)'s no-remuneration condition. That would dramatically reduce the reach of the "aggravated felony" provision at issue under petitioner's view of the categorical approach (see Pet. Br. 19-20).

Anticipating the argument that his theory precludes "aggravated felony" status for many criminal aliens who engaged in "substantial marijuana transactions," petitioner speculates that such crimes "will often result in convictions under separate provisions criminalizing drug 'trafficking,' which is a 'felony punishable under the Controlled Substances Act' because it establishes that the non-citizen distributed more than a small amount."

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[16] See Ariz. Rev. Stat. Ann. § 13-3405(A)(2); Ark. Code Ann. §§ 5-64-101(7), 5-64-436(a); Cal. Health & Safety Code § 11359; Haw. Rev. Stat. Ann. § 712-1247(1)(h); Me. Rev. Stat. Ann. tit. 17-A, §§ 1101(17)(C) and (D), 1103(1-A)(C) and (E); Nev. Rev. Stat. Ann. § 453.337(1); Or. Rev. Stat. § 475.860(2)(a); Tex. Health & Safety Code Ann. § 481.120(b)(2); Vt. Stat. Ann. tit. 18, § 4230(b)(1); see also NYU Amicus Br. 9 & n.8 ("Remuneration is irrelevant to applicable marijuana distribution offenses in at least 39 states, as well as in the District of Columbia and Puerto Rico.") (citations omitted). Some other jurisdictions require remuneration in separate offenses limited to the distribution of marijuana to a minor. See, *e.g.*, Colo. Rev. Stat. Ann. § 18-18-406(7)(a); D.C. Code § 48-904.06(b).

Similarly, only nine states had remuneration requirements when Congress enacted the ADAA in 1988. While Vermont did not treat remuneration as relevant at that time, see Vt. Stat. Ann. tit. 18, § 4205 (1988), Kentucky punished the sale or possession with intent to sell separately, see Ky. Rev. Stat. Ann. § 218A.990(4) (1988).

Pet. Br. 23. That speculative assertion, however, overlooks some critical points.

First, it ignores that even when a harsher, more specific criminal statute may be available, often defendants are charged under a lesser, more general provision. See *Hayes*, 555 U.S. at 427 & n.8 (noting continuing prosecution of domestic violence under generally applicable provisions despite increasing prevalence of statutes specifically proscribing domestic violence). Such charging and plea decisions are likely not uncommon for marijuana crimes where the trafficking penalties are significantly harsher.

Second, it ignores that several States (at least 9) punish marijuana distribution irrespective of amount, without either a separate marijuana-trafficking provision or a system of graduated statutory sentences keyed to quantity.[17] The quantity of marijuana involved in the

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[17] Our search turned up nine States (plus the District of Columbia) meeting those criteria (*i.e.*, that do not separately punish higher quantities of marijuana). See Cal. Health & Safety Code §§ 11359, 11360(a); D.C. Code § 48-904.01(a)(2)(B) (exception for first-time offense involving one-half pound or less); La. Rev. Stat. Ann. § 40:966(A) and (B)(3); Mont. Code Ann. § 45-9-101(1); Neb. Rev. Stat. Ann. § 28-416(1); Or. Rev. Stat. § 475.860(1)(a); Utah Code Ann. § 58-37-8(1)(b)(ii); Wash. Rev. Code Ann. § 69.50.401(1) and (2)(c); W. Va. Code Ann. § 60A-4-401(a)(ii); Wyo. Stat. Ann. § 35-7-1031(a)(ii). Cf. NYU Amicus Br. 9-10 & n.9 ("Drug quantity is irrelevant to applicable marijuana distribution offenses in at least 23 states and in Puerto Rico.").

At the time of the ADAA's enactment, six additional states punished distribution without regard to the quantity of marijuana involved. See Colo. Rev. Stat. Ann. § 18-18-106(8)(b)(I) (1988); Idaho Code Ann. § 37-2732(a) (1988); Md. Ann. Code art. 27, § 286(a)(1) (1988); Minn. Stat. § 152.09(1) (1988); Mo. Rev. Ann. Stat. § 195.020 (1988); Vt. Stat. Ann. tit. 18, § 4205 (1988).

crime, no matter how great, is irrelevant to the conviction in those States.

Third, it ignores that the CSA undisputedly punishes as a felony any marijuana distribution-related conduct involving greater than a "small amount." Because a "small amount" is far less than that required to trigger trafficking offenses or other statutorily graduated penalties, which often require pounds or kilograms rather than ounces or grams, that leaves a substantial gap between what Congress considers an amount sufficient to constitute a felony under Section 841(b)(1)(D)—and thus an "aggravated felony"—and the response petitioner provides. Many, if not most, marijuana distribution-related convictions fall within that gap (*i.e.*, between a "small amount" and the trafficking amount). Under Georgia law, for example, only distribution of more than 10 pounds of marijuana triggers the trafficking offense. Ga. Code Ann. § 16-13-31(c). Indeed, marijuana-distribution offenses in at least 25 States require a minimum quantity substantially above a "small amount" to trigger the graduated penalty or trafficking offense.[18]

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[18] See Ala. Code § 13A-12-231(1) (more than 2.2 pounds); Ariz. Rev. Stat. Ann. § 13-3405(B)(4)-(6) (2 pounds or more); Colo. Rev. Stat. § 18-18-406(6)(b)(III) (5 pounds or more); Conn. Gen. Stat. Ann. § 21a-278(b) (1 kilogram or more); Del. Code Ann. tit. 16, §§ 4751C, 4752-4754 (1,500 grams or more); Fla. Stat. Ann. § 893.135(1)(a) (more than 25 pounds); Ga. Code Ann. § 16-13-31(c) (more than 10 pounds); Idaho Code Ann. § 37-2732B(a)(1) (1 pound or more); Iowa Code Ann. § 124.401(1)(d) (more than 50 kilograms); Ky. Rev. Stat. Ann. § 218A.1421(3) (8 ounces or more); Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(E) (more than 1 pound); Md. Code Ann., Crim. Law § 5-612(a)(1) (50 pounds or more); Mass. Gen. Laws Ann. ch. 94C, § 32E(a) (50 pounds or more); Mich. Comp. Laws Ann. § 333.7401(2)(d) (5 kilograms or more); Minn. Stat. Ann. § 152.023(1)(5) (5 kilograms or more); Nev. Rev. Stat. Ann. § 453.339(1) (100 pounds or more); N.M.

Accordingly, many convictions for distributing marijuana in a clear majority of States would not result in an "aggravated felony" determination under petitioner's view, even for the substantial portion that involve more than a small amount for remuneration. "[T]o apply a categorical approach here would leave [Section 1101(a)(43)(B)'s 'aggravated felony' designation] with little, if any, meaningful application" to marijuana distribution offenses. *Nijhawan*, 557 U.S. at 39.[19]

Stat. Ann. § 30-31-22(A)(1)(a) and (c) (more than 100 pounds); N.C. Gen. Stat. § 90-95(h)(1) (more than 10 pounds); N.D. Cent. Code § 19-03.1-23.1(1)(c)(11) (500 grams or more); Ohio Rev. Code Ann. § 2925.03(C)(3) (200 grams or more); Okla. Stat. Ann. tit. 63, § 2-415(C)(1)(a) (25 pounds or more); 35 Pa. Stat. Ann. § 780-113(a)(30) and (f)(1.1) (more than 1,000 pounds); R.I. Gen. Laws §§ 21-28-4.01(a)(4), 21-28-4.01.1(a)(5), 21-28-4.01.2(a)(5) (1 kilogram or more); S.C. Code Ann. § 44-53-370(e)(1) (10 pounds or more); Wis. Stat. Ann. § 961.41(1m)(h) (more than 200 grams). See also Pet. Br. 22 n.3.

When Congress passed the ADAA in 1988, two additional states fell in this category. See Ark. Code Ann. § 5-64-401(a)(iv) (1988) (10 pounds or more); Kan. Stat. Ann. § 65-4127b (1988) (1500 grams or more). One drops out. Iowa Code Ann. § 204.410 (1988). Four other states listed above did not differentiate at all based on marijuana quantity at that time. See note 17, *supra* (adding Colorado, Idaho, Maryland, and Minnesota for 1988).

[19] Nor would application of the "modified categorical approach" remedy the problem. Given that many relevant state provisions do not depend on either remuneration or a specific quantity of marijuana (at least below a very large amount), the record of conviction presumably would not often include information disproving the applicability of Section 841(b)(4). Even petitioner does not rely on that possibility.

c. Applying petitioner's approach to other federal statutes containing similar fact-specific exceptions and affirmative defenses would seriously disrupt Congress's scheme

Mitigating exceptions and affirmative defenses in other federal criminal statutes would pose similar problems under petitioner's expanded categorical approach. Unless the elements (or at least sentencing provisions) of a state law map precisely onto the exception or defense provided in the corresponding federal statute (*i.e.*, the "generic offense"), that exception or defense would preclude a finding of equivalence under petitioner's view. That would be true no matter how narrow the federal-law exception, or how unlikely its applicability to a particular state-law conviction, because petitioner would require that the state conviction "necessarily" exclude the possibility that the mitigating exception or affirmative defense applied. Pet. Br. 23-26. Some examples from other statutes show how disruptive that would be.

The INA makes removable any alien convicted under "any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18)." 8 U.S.C. 1227(a)(2)(C); see also 8 U.S.C. 1101(a)(43)(C) (defining "aggravated felony" to include "illicit trafficking in firearms * * * as defined in section 921 of title 18"); 8 U.S.C. 1227(a)(2)(A)(iii) (alien convicted of "aggravated felony" is removable). Section 921(a), in turn, defines "firearm" to exclude "an antique firearm." 18 U.S.C. 921(a)(3); see also 18 U.S.C. 921(a)(16) (defining "an-

tique firearm"). Under petitioner's theory, for a state-law firearms conviction to qualify, the statutory definition of the state offense would have to negate the exceedingly remote possibility that the conviction was based on an antique firearm. The INA's provisions thus would lose all practical effect for any state firearm laws lacking a parallel "antique firearm" exception.

In *Gil* v. *Holder*, 651 F.3d 1000 (2011), the Ninth Circuit correctly rejected that untenable outcome. The alien in that case argued that the state firearms law under which he was convicted (Cal. Penal Code § 12025(a) (2004))[20] was broader than 8 U.S.C. 1227(a)(2)(C) because the state law did not contain an antique firearms exception. Applying the categorical approach, the court stated that it would "not consider the availability of affirmative defenses; the fact that there may be an affirmative defense under the federal statute, but not under the state statute of conviction, does not mean that the state conviction does not fall categorically within the federal statute." *Gil*, 651 F.3d at 1005; see also *United States* v. *Velasquez-Bosque*, 601 F.3d 955, 963 (9th Cir. 2010) ("The availability of an affirmative defense is not relevant to the categorical analysis.").[21]

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[20] Now codified at Cal. Penal Code § 25400 (West 2012).

[21] The Ninth Circuit reserved the question of whether the availability of an affirmative defense might require evaluating the state conviction under the "modified categorical approach" in cases where the alien claims that he fell within the antique firearm exception. *Gil*, 651 F.3d at 1005 n.2. The Board has addressed that issue through a burden-shifting framework: once the government demonstrates an alien was convicted of a firearms offense, the alien has the burden of presenting evidence that the firearm qualified as an antique firearm. See *In re Mendez-Orellana*, 25 I. & N. Dec. 254, 256 (B.I.A. 2010).

As another example, the INA treats certain document-fraud crimes as an "aggravated felony," "except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision" of the INA. 8 U.S.C. 1101(a)(43)(P). The categorical approach should not, as petitioner would have it, allow aliens convicted of document fraud to evade the intended immigration consequences or criminal sentencing enhancement just because the underlying offense did not require *disproving* that familial exception. See *Roman* v. *Gonzales*, 204 Fed. Appx. 486, 487-488 (5th Cir. 2006), cert. denied, 549 U.S. 1347 (2007); see also *United States* v. *Guzman-Mata*, 579 F.3d 1065, 1070-1072 (9th Cir. 2009) (declining to treat the "family exception" in 8 U.S.C. 1101(a)(43)(N) as an element of the "generic offense" for purposes of the categorical approach). Congress would not have intended its sanctions to apply in "so limited and so haphazard a manner." *Nijhawan*, 557 U.S. at 40; see also *id.* at 37-38 (discussing 8 U.S.C. 1101(a)(43)(N) and (P)).

More broadly, petitioner's theory potentially requires the government, based on the underlying conviction alone, to disprove common-law affirmative defenses or mitigating exceptions (*e.g.*, duress or necessity in a murder or crime-of-violence case). That cannot be correct. But it is not clear why, for purposes of the categorical approach, those should be treated differently than a statutory defense or exception.[22]

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[22] Perhaps petitioner would argue that a conviction under state law, which presumably would be subject to the same common-law defense,

3. By providing aliens an opportunity to proffer evidence in immigration court that the circumstances identified in Section 841(b)(4) were present, the Board avoids unfair consequences

Excluding mitigating exceptions or affirmative defenses from the categorical approach, however, does not end the inquiry. The Board has made clear that an alien can defeat an "aggravated felony" finding if he carries his burden to prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration. See *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012). That procedure answers any assertion (see Pet. 13-14, 18) that the decision below would result in unintended or unfair consequences.

In *Castro-Rodriguez*, the alien had been convicted of an offense whose elements consisted of possessing with intent to distribute less than half an ounce of marijuana. The alien testified in immigration court that he had bought the marijuana at a party. The immigration judge therefore found that the alien had possessed only a small amount of marijuana for no remuneration. 25 I. & N. Dec. at 699. The Board agreed that the alien could defeat the aggravated-felony finding by making such a showing, and that he could do so "by any probative evidence," including his own testimony. *Id.* at 702. The Board remanded for further factfinding on the circumstances of the particular case, *i.e.*, whether the alien had

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implicitly negates the defense. But the same result should follow in this context for any State that has an exception in its marijuana distribution laws parallel to Section 841(b)(4). Cf. note 15, *supra*.

in fact intended to distribute the marijuana for remuneration. *Id.* at 704.[23]

Petitioner contends that the Board's procedure "revert[s] to the fact-specific inquiry that the categorical approach rejects." Pet. Br. 31; see *id.* at 31-34. That criticism rings hollow given petitioner's own effort to *expand* the categorical approach: petitioner seeks to look beyond whether the conduct proscribed by state law (*i.e.*, knowing possession of marijuana and intent to distribute it) necessarily satisfies the elements of the CSA felony to whether that conduct might have implicated a mitigating exception (*i.e.*, distribution of a "small amount" of marijuana for no remuneration). *E.g.*, *id.* at 19-20, 26-28, 37-41. Indeed, the government's core categorical argument—hotly contested by petitioner—is

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[23] At the time Congress added the drug-trafficking aggravated felony provision and made it a basis for removal, a preexisting law made aliens deportable for drug convictions but subject to a waiver if the alien proved the conviction involved simple possession of marijuana of "30 grams or less." 8 U.S.C. 1251(f)(2) (1982); see 47 Fed. Reg. 12,133 (Mar. 22, 1982) (providing that waiver may be sought before an immigration judge). Consistent with the Board's approach in this context, the alien could rely in immigration court on evidence beyond the conviction record. See *In re Grijalva*, 19 I. & N. Dec. 713, 718 (B.I.A. 1988) ("[W]here the amount of marihuana that an alien has been convicted of possessing cannot be readily determined from the conviction record, the alien who seeks section [1251](f)(2) relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved '30 grams or less of marihuana.'"). In enacting the present scheme, Congress presumably would have been familiar with this sort of framework for determining the immigration consequences of drug convictions.

that the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony. See pp. 16-17, *supra*.[24]

More fundamentally, petitioner fails to recognize that the Board's procedure operates as a subsequent step *outside the categorical approach* in light of Section 841(b)(4)'s "circumstance-specific" nature. *Castro-Rodriguez*, 25 I. & N. Dec. at 702 (quoting *Nijhawan*, *supra*). A fact-specific inquiry naturally follows for such "circumstance-specific" factors, even when a categorical approach applies to other components of the same aggravated felony. See *Nijhawan*, 557 U.S. at 40-42 (applying categorical approach to fraud component but "circumstance-specific" approach to $10,000 loss component); see also *Kawashima*, 132 S. Ct. at 1172 & n.3.

Because Section 841(b)(4) operates as a mitigating exception (akin to an affirmative defense), it makes sense that the inquiry occurs only after determining presumptive felony status under Section 841(a) and (b)(1)(D) based on the categorical approach. Indeed, the Board's procedure is not unique to this particular statutory provision. See note 21, *supra* (noting similar Board procedure in context of firearms exception in Section 1227(a)(2)(C) cases); see also *Guzman-Mata*, 579 F.3d at 1072-1073 (placing burden on defendant in criminal sentencing-enhancement context to prove "family exception" in 8 U.S.C. 1101(a)(43)(N)); *United States* v. *Rabanal*, 508 F.3d 741, 743-744 (5th Cir. 2007) (holding

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[24] Contrary to petitioner's hyperbole (Pet. Br. 38), the government does not contend that "a non-citizen convicted in federal court directly under the misdemeanor distribution provision of the CSA would nonetheless be deemed to have committed an aggravated felony." Based on the sentencing judgment alone, any such alien obviously would defeat an aggravated-felony finding under the methodology described in this section.

that government must show relevant conviction to trigger sentencing enhancement based on 8 U.S.C. 1101(a)(43)(N), while "[t]he burden is on the defendant to 'affirmatively show[]' that the prior offense was a first offense involving only qualifying family members") (brackets in original); *Roman*, 204 Fed. Appx. at 488 (confirming alien's burden "to establish his affirmative defense that he was not deportable because he fell within § 101(a)(43)(P)'s exception").

Petitioner and amici supporting petitioner also contend that the record of conviction often will not address the Section 841(b)(4) factors, and that aliens would not have had the incentive to build the appropriate record. See Pet. Br. 12, 35; NYU Amicus Br. 8-10. Aliens facing marijuana-distribution charges, however, will be advised of the immigration consequences of a conviction and can take steps to avoid or mitigate such consequences. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("[C]ounsel must inform her client whether his plea carries a risk of deportation."). Indeed, one of the Court's reasons in *Padilla* for recognizing defense counsel's obligation to provide such advice was to facilitate plea bargaining "to craft a conviction and sentence that reduce the likelihood of deportation." *Ibid.*

In any event, permissible evidence in immigration court is not limited to documents from the conviction record (as in the modified-categorical approach); it also includes other probative evidence. See *Castro-Rodriguez*, 25 I. & N. Dec. at 702. Police and laboratory reports often include information on drug quantity, and, as to remuneration, the immigration court may rely on the alien's own testimony. *Id.* at 699, 702-704 & n.5. The alien's testimony is obviously readily accessible. Acquiring the former type of evidence from official files,

if not already in the alien's possession, generally is not unusually burdensome. And the immigration court may be able to facilitate the process where appropriate. Cf. *Nijhawan*, 557 U.S. at 41 (rejecting argument that alien would not have a "fair opportunity" to dispute government evidence outside the conviction record).

As the Court recognized in *Nijhawan*, its modified-categorical approach precedents (*e.g.*, *Taylor* and *Shepard*) developed a limited category of types of evidence "for a very different purpose"—*i.e.*, "determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction"—not for a circumstance-specific inquiry in immigration court. 557 U.S. at 41-42. The Court also recognized that strictly limiting the evidence to conviction records on facts that are not offense elements would be "impractical." *Id.* at 42. Given the prevalence of state laws that require no proof of either remuneration or drug quantity, the same is true here. See pp. 26-31, *supra*; see also Pet. Br. 35 (deeming Section 841(b)(4) facts "*irrelevant*" under state laws of conviction); NYU Amicus Br. 8-10 (similar).[25]

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[25] Petitioner requests a further opportunity to prove that his conviction involved only a small amount of marijuana for no remuneration. Pet. Br. 41 n.7. Even if petitioner had preserved an argument on small drug quantity (but see Pet. App. 9a n.4), he has never clearly argued (let alone provided any evidence) that he intended to distribute marijuana for no remuneration. See p. 6 & n.3, *supra*. Generally, the proper way for an alien to raise new issues and evidence after the Board has issued a decision is by filing a timely motion to reopen and remand with the Board, but petitioner did not do that. See 8 C.F.R. 1003.1(d)(3)(iv); 1003.2(a) and (c). In light of the circumstances of this case (including the fact that *Castro-Rodriguez* was not decided until after the decisions below), however, the government is amenable to

C. The Decision Below Is Consistent With *Carachuri-Rosendo*

Relying principally on *Carachuri-Rosendo*, *supra*, petitioner argues that the categorical approach should turn not on whether the state conviction necessarily satisfies the elements of a CSA felony (*e.g.*, knowing possession of a controlled substance and specific intent to distribute it), but rather on whether the state conviction necessarily precludes treatment as a CSA misdemeanor (by *negating* Section 841(b)(4)'s exception). Pet. Br. 26-28, 37-41. Like the other precedents cited above (pp. 14-15, *supra*), however, *Carachuri-Rosendo* supports the court of appeals' application of the categorical approach here.

The Court in *Carachuri-Rosendo* considered a state offense that was punishable in two ways under the CSA: one a misdemeanor (simple possession) and one a felony (recidivist possession). The elements of simple and recidivist possession are identical because recidivism is not an element to be found by the jury beyond a reasonable doubt, see 130 S. Ct. at 2581 n.3, and the question in *Carachuri-Rosendo* was how to determine whether a state offense would have been "punishable" as a recidivist offense, and thus a felony, under the CSA. The Court held that when a defendant is convicted of simple possession in state court, but evidence outside the record of conviction could establish that he is a recidivist, his state-law crime nonetheless is analogous to the federal offense of simple possession, not recidivist possession. *Id.* at 2586-2589.

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petitioner's request for another opportunity to prove that the exception covers his conviction.

Nothing in *Carachuri-Rosendo* heralded a dramatic change in focus in the "aggravated felony" context from the elements of an offense (see pp. 13-16, *supra*) to the non-element "conduct underlying" an offense (Pet. 13); nor did it create any general rule that the predicate conviction must negate any possibility of a mitigating exception or affirmative defense to the generic offense. To the contrary, this Court has confirmed since *Carachuri-Rosendo* that the focus in an ordinary categorical-approach case is on the elements of the offenses. See *Kawashima*, 132 S. Ct. at 1172 ("If the *elements* of the offenses establish that [the alien] committed crimes involving fraud or deceit, then the first requirement of [the relevant aggravated felony] is satisfied" under the categorical approach.) (emphasis added).

The decision below is fully consistent with *Carachuri-Rosendo*. The Court there held that a conviction is for an offense "punishable" as a felony under the CSA only if the prosecutor takes all the requisite steps to trigger a statutory maximum sentence in excess of one year. 130 S. Ct. at 2587-2588.[26] Here, all the facts necessary to subject petitioner to a five-year sentence under the CSA were established by his Georgia conviction: he knowingly possessed marijuana with intent to distribute it. See 21 U.S.C. 841(b)(1)(D). No other fact had to be proved; the government was under no obligation to prove either quantity or remuneration. 21 U.S.C. 885(a)(1); see pp. 18-23, *supra*.

In *Carachuri-Rosendo*, the government advanced a theory under which it could have separately established recidivism in immigration court (because the state con-

[26] In the case of recidivist possession, those steps under the CSA include filing a criminal information alleging any prior convictions. See 21 U.S.C. 844(a), 851.

viction itself did not do so) to trigger the CSA felony. In rejecting that theory, the Court explained that it was asked "to consider facts not at issue in the crime of conviction (*i.e.*, the existence of a prior conviction) to determine whether [the alien] *could have* been charged with a federal felony." 130 S. Ct. at 2588. In this case, by contrast, no finding beyond the elements of petitioner's state conviction is necessary to establish a CSA felony. This case thus does not involve "[t]he mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law." *Id.* at 2589. Rather, because there was no proof in either the criminal or removal proceedings to bring the case within the exception in Section 841(b)(4), petitioner had been "*actually convicted* of a crime that is itself punishable as a felony under federal law." *Ibid.*; see also *id.* at 2591 (focusing on "elements [of the state crime] the alien has been 'convicted of'") (Scalia, J., concurring in judgment). The government's argument in this case therefore differs fundamentally from the one rejected in *Carachuri-Rosendo*.

This case differs from *Carachuri-Rosendo* in at least two other material ways. First, the Court relied in part on its observation that "apply[ing] an 'aggravated' or 'trafficking' label to *any* simple possession offense is, to say the least, counterintuitive and 'unorthodox.'" 130 S. Ct. at 2585 (quoting *Lopez*, 549 U.S. at 54). Here the crime at issue is possession with intent to distribute, which, unlike simple possession, is part of the CSA's

main criminal drug-distribution provision (21 U.S.C. 841(a)).[27]

Second, the Court noted that Congress "chose to authorize only a 1-year sentence for nearly all simple possession offenses, but it created a narrow exception for those cases in which a prosecutor elects to charge the defendant as a recidivist." *Carachuri-Rosendo*, 130 S. Ct. at 2586. Here the scheme is the opposite: Congress authorized a five-year sentence for nearly all distribution-related offenses (21 U.S.C. 841(b)(1)(D)), but it created a narrow exception for those cases in which a defendant affirmatively proves that he distributed only a small amount of marijuana for no remuneration (21 U.S.C. 841(b)(4)). That narrow exception should not swallow the statutory rule under the CSA when it comes to "aggravated felony" determinations based on the categorical approach.[28]

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[27] Relatedly, unlike the alien in *Carachuri-Rosendo* (130 S. Ct. at 2583), petitioner here was not convicted of a misdemeanor under state law. Rather, he was convicted of possession with intent to distribute marijuana under Ga. Code Ann. § 16-13-30(j)(1) (2007), a felony punishable under Georgia law by up to ten years of imprisonment irrespective of the amount involved, see *id.* § 16-13-30(j)(2) (2007). See pp. 4-5 & n.1, *supra*. Accordingly, petitioner's state conviction qualifies as a "felony punishable under the [CSA]" under Justice Thomas's separate opinion in *Carachuri-Rosendo* as well. See 130 S. Ct. at 2591.

[28] Petitioner attempts to analogize this case to *Carachuri-Rosendo* on the ground that his federal Sentencing Guidelines sentence "would not have exceeded one year, and very likely would have been less than 6 months." Pet. Br. 27-28 (quoting 130 S. Ct. at 2589). That is incorrect. The Guidelines range for a defendant convicted of possession with intent to distribute marijuana under the CSA, where the quantity is less than 250 grams of marijuana, is 0 to 18 months of imprisonment. See Sentencing Guidelines § 2D1.1(a)(5) and (c)(17); *id.* Ch. 5, Pt. A (sentencing table). Depending on his criminal history category, petitioner thus could have been sentenced to more than 12 months of imprison-

D. No Canon Of Construction Warrants A Different Conclusion In This Case

Contrary to petitioner's contention (Br. 17-18), there is no reason for the Court to resort to any canon of construction to resolve this case. Because the definition of "aggravated felony" depends on an interpretation of the criminal laws, the rule of lenity is potentially applicable. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). But resort to that principle is appropriate only if there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted); see also, *e.g.*, *Kawashima*, 132 S. Ct. at 1176 ("We think the application of the present statute clear enough that resort to the rule of lenity is not warranted."); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (before resorting to the rule of lenity, the Court considers the "the language and structure, legislative history, and motivating policies of the statute") (internal quotation marks omitted)).

There is no such ambiguity in this case. Nobody disputes that Section 841(b)(4)'s requirements are not offense elements. See pp. 18-23, *supra*. And the broader

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ment under the Guidelines. Petitioner mistakenly assumed a base offense level of 4, see Pet. Br. 28 (citing Sentencing Guidelines § 2D2.1), which applies only to simple possession of marijuana, not possession with intent to distribute marijuana. Petitioner apparently proceeded from the unproven premise that his offense qualified for Section 841(b)(4) treatment as involving only a small amount of marijuana for no remuneration. A federal sentencing court would not have done so unless petitioner carried his burden of establishing those conditions. See pp. 18-23, *supra*.

statutory framework strongly indicates that absent proof by the alien that his conviction falls within the narrow exception in Section 841(b)(4), Congress intended to treat all convictions for distribution of (or possession with intent to distribute) marijuana by aliens as an "aggravated felony." Petitioner's contrary view would impede Congress's goal by removing such aliens in a "haphazard" manner. *Nijhawan*, 557 U.S. at 40.

Petitioner also contends (Br. 17) that ambiguities should be construed in favor of an alien facing deportation. Application of such a proposition would be particularly misplaced here because Congress has made clear that it does not wish to give the benefit of the doubt to criminal aliens, see pp. 23-25, *supra*, and the aggravated-felony provision at issue applies only to aliens who are convicted drug offenders. In any event, a court may properly consider whether remaining ambiguities should be resolved in favor of the alien only after using every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). As just discussed, no such ambiguity remains here.[29]

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[29] Invoking the canon that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains," one of the amici contends that the government's position would put the United States into conflict with its obligations under Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223. See Human Rights First Amicus Br. 16 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). In particular, amicus argues that Article 33 prohibits a contracting nation from returning a refugee to a territory where his "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" ("*refoulement*"), unless he is convicted of a "particularly serious crime." *Id.* at 17 (quoting Article 33(1) and (2)). Because an "aggravated felony"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DONALD E. KEENER
W. MANNING EVANS
Attorneys

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conviction bars eligibility for asylum, 8 U.S.C. 1158(b)(2)(B)(i), amicus further argues, the government's position would permit *refoulement* even though the aggravated felony is not necessarily a "particularly serious crime." Human Rights First Amicus Br. 18-27. But an alien convicted of an aggravated felony generally may still seek (*inter alia*) withholding of removal, unless the term of imprisonment actually imposed for the conviction is five years or more (which would suggest a "particularly serious crime"). 8 U.S.C. 1231(b)(3)(B). Because withholding of removal prohibits the government from removing an alien to a country where the alien's "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1231(b)(3)(A), which tracks the language of Article 33's non-*refoulement* provision, the availability of such relief to aggravated felons like petitioner answers any *Charming Betsy* concern.

APPENDIX

1. 8 U.S.C. 1101(a) provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of the title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

* * * * *

2. 8 U.S.C. 1227(a) provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens.

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

3. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

4. 18 U.S.C. 924(c) provides in pertinent part:

Penalties

* * * * *

(2) For purpose of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.),

the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

* * * * *

5. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * * *

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(1)(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any per-

son commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provision of title 18 or $500,000 if the defendant is an individual or $2,000.000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

* * * * *

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

* * * * *

6. 21 U.S.C. 844(a) provides

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in

the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not

more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

7. 21 U.S.C. 885(a)(1) provides:

Burden of proof; liabilities

(a) Exemptions and exceptions; presumption in simple possession offenses

(1) It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

8. Ga. Code Ann. 16-13-2 (2007) provides:

Conditional discharge for possession of controlled substances as first offense and certain nonviolent property crimes; dismissal of charges; restitution to victims.

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleades guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three

years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed $1,000.00, or both, or public works not to exceed 12 months.

(c) Persons charged with an offense enumerated in subsection (a) of this Code section and persons charged for the first time with non violent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol who are eligible for any court approved drug treatment program may, in the discretion of the court and with the consent of the accused, be sentenced in accordance with subsection (a) of this Code section. The probated sentence imposed may be for a period of up to five years. No discharge and dismissal without court adjudication of guilt

shall be entered under this subsection until the accused has made full restitution to all victims of the charged offenses. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.

9. Ga. Code Ann. 16-13-30(j) (2007) provides:

Purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana; penalties.

(j)(1) It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

(2) Except as otherwise provided in subsection (c) of Code Section 16-13-31 or in Code Section 16-13-2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

10. Ga. Code Ann. 16-13-31(c) (2007) provides:

Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine; penalties.

(c) Any person who knowingly sells, manufactures, grows, delivers, brings into this state, or has possession

of a quantity of marijuana exceeding 10 pounds commits the offense of trafficking in marijuana and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of marijuana involved is in excess of 10 pounds, but less than 2,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of $100,000.00;

(2) If the quantity of marijuana involved is 2,000 pounds or more, but less than 10,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of seven years and shall pay a fine of $250,000.00; and

(3) If the quantity of marijuana involved is 10,000 pounds or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of $1 million.

11. Ga. Code Ann. 42-8-60(a) (2007)

When applicable; violation of probation

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:

(1) Defer further proceeding and place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

REPLY BRIEF

No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

Petitioner, a first-time drug offender, was arrested in Georgia in possession of 1.3 grams of marijuana and pleaded guilty to one count of possession with intent to distribute in violation of state law. No conviction was entered and he received no jail time. The charges will soon be expunged altogether.

Petitioner's conviction is equally consistent with either a felony or a misdemeanor under federal law, because under the Controlled Substances Act possession with intent to distribute marijuana can constitute either. It is a felony if the conviction involved more than a small amount of marijuana or petitioner received remuneration; if not, it is only a misdemeanor. Here, the conviction establishes only that petitioner possessed some amount of marijuana with the intent to provide it to a third party. The conviction is perfectly consistent with the social sharing of a small amount of marijuana, which is a misdemeanor under federal law. Indeed, the Government implicitly concedes that fact in agreeing that at the very least petitioner is entitled to prove that his offense corresponds to the misdemeanor offense. U.S. Br. 39-40 n.25.

Under the categorical approach, the fact that petitioner's conviction is consistent with a federal misdemeanor compels the conclusion that he was not convicted of an "aggravated felony." So petitioner is subject to removal at the discretion of the Attorney General, but he is not to be *automatically* deported without regard to the circumstances. As this Court explained in *Carachuri-Rosendo v. Holder*: a rule

deeming drug convictions "controlled substances" offenses rather than "aggravated felonies" has only a "limited" effect on "policing our Nation's borders," because then removal remains within "the discretion of the Attorney General." 130 S. Ct. 2577, 2589 (2010).

The Government's contrary position is untenable. It directly contradicts this Court's precedents applying the "categorical approach," under which a conviction corresponds to a federal felony only if the fact of conviction itself establishes the felony's requirements. Recognizing that its interpretation of the categorical approach would produce gross injustices on a sweeping scale – requiring the mandatory deportation of non-citizens who commit only misdemeanor offenses – the Government now proposes a *second* inquiry, which in every case would require the non-citizen to prove (and would require immigration officials to decide) whether the facts of the predicate offense correspond to a misdemeanor. That proposal itself directly contradicts the categorical approach – the essence of which is that the court does not inquire into the underlying facts of the case – and is completely unworkable in practice. The judgment accordingly should be reversed.

I. There Is No Merit To The Government's Invocation Of The Burden Of Proof In Criminal Proceedings.

The "categorical approach" imposes a strict standard that the Government's brief ignores altogether. The Government is subject to "the demanding requirement" that the conviction "'necessarily' involved (and a prior plea necessarily

admitted) facts equating to" the federal felony. *Shepard v. United States*, 544 U.S. 13, 19, 24 (2005). So the conviction is a felony "[o]nly" if the court in entering the conviction "necessarily had to find" the features of the felony. *Id.* at 17 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). *See also Kawashima v. Holder*, 132 S. Ct. 1166, 1172-73 (2012). The Government's burden is substantially reinforced by the rule of construction that the immigration laws – particularly those implicating criminal prohibitions – are construed in favor of the non-citizen. *Carachuri-Rosendo*, 130 S. Ct. at 2589. Further, in removal proceedings, the Immigration and Nationality Act (INA) itself places the burden of proof squarely on the government. 8 U.S.C. § 1229(c)(3)(A). *See generally Amicus* Br. of Immigration Law Professors 3-19 (describing the long-settled categorical rule in immigration law); *Amicus* Br. of Human Rights First (discussing the canon that statutes should be construed to be consistent with the nation's treaty obligations).

This Court has also stressed the relevance of a "commonsense" reading of the relevant statutory provisions. *Carachuri-Rosendo*, 130 S. Ct. at 2585; *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006). There is no sensible basis to believe that Congress would have intended to treat such a minor drug conviction as "illicit trafficking" – so grave that the Attorney General should be stripped of any authority to even *consider* whether petitioner should be allowed to remain in the country.

The Fifth Circuit nonetheless held that a conviction for possession with intent to distribute marijuana is presumptively a felony because that is

how it would be treated in a federal criminal prosecution. Pet. App. 7a-8a. But there is an inescapable flaw in that argument: this is not a criminal prosecution; instead, it is an immigration proceeding governed by the categorical approach, under which the Government bears the heavy burden of showing that the conviction necessarily corresponds to the relevant offense – here, the aggravated felony of drug trafficking. Importantly, *none* of this Court's categorical approach precedents derive the applicable burden of the proof from the Government's obligation to prove a criminal case. Hence, whether a criminal defendant would have the burden to establish the misdemeanor's applicability in a criminal proceeding makes no difference either. It is the categorical approach that itself places the burden on the Government.

This Court corrected this same error in *Carachuri-Rosendo*, in which the Fifth Circuit had held that the Government could go beyond the conviction to prove the additional facts required to establish an aggravated felony, as it would in a "hypothetical" federal prosecution. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009). This Court reversed, holding that the facts must be established by the conviction itself. *Carachuri-Rosendo,* 130 S. Ct. at 2586-87. In this case, if anything, the court of appeals went even further: it *presumed* that petitioner's conviction corresponded to the felony because petitioner had not proved the contrary.

The Government's analogy between this immigration proceeding and a criminal prosecution is also unrealistic. To be sure, the lower courts have

held that a criminal defendant in a federal prosecution must prove the applicability of the misdemeanor provision; however, that burden functions very differently in actual federal criminal trials. The cases cited by the Government arose in the transitional period after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as defendants attempted to take advantage of the fact that prosecutors had not specifically indicted and proved the quantity of marijuana at issue. In response to that argument, the lower courts held that the burden of proof lies on the defendant. *E.g.*, *United States v. Outen*, 286 F.3d 622, 635-36 (2d Cir. 2002).

As a practical matter, after that transitional period, the burden of proof has made almost no material difference in federal criminal prosecutions for two reasons. First, the federal court almost always has before it evidence on the amount of marijuana and whether the defendant sold it. That evidence is part of the basic proof in the prosecution's case. The evidence is straightforward, so that cases almost never end in an equipoise that makes the burden of proof determinative.

Second, federal prosecutors rarely pursue such misdemeanor "social sharing" cases involving small amounts of marijuana and no remuneration. They leave such cases to state officials. Those convictions almost always arise in the federal system as a result of plea bargains that resolve more serious charges.

But the Government's attempt to teleport the criminal burden of proof to the very different context of removal proceedings would have dramatically different consequences in immigration cases. Criminal defendants (unlike non-citizens in removal

proceedings) have the right to counsel and to be provided with evidence favorable to the defense. Just as important, the Government seeks to take great advantage of the fact that the predicate state conviction – unlike the factual record that would be before a court in a federal prosecution – does not require any findings of drug quantity or remuneration, because those facts are irrelevant to the state case. In the view of the Government, every such conviction with a "silent" record is thus presumptively a federal felony. A federal criminal prosecution would never proceed based on presumptions about the quantity of drugs, because the facts would be easily proved and readily available to the court.[1]

II. The Government Errs In Relying On Offense "Elements."

The Government argues that under the categorical approach petitioner's conviction is an

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[1] The Government commits the same fallacy in assuming that petitioner possessed a larger quantity of marijuana in calculating his Sentencing Guideline range. U.S. Br. 43-44 n.28. In an actual federal criminal prosecution, that presumption would never arise because the evidence would be before the court. Worse still, the Government's position is that a *police report* showing that petitioner possessed only 1.3 grams, Pet. Br. App. 19, is not even sufficient to "carr[y] his burden of proof," U.S. Br. 44 n.28. That is yet another illustration of the unrealistic burden the Government's proposal would place on non-citizens to prove that their predicate offenses correspond to the federal misdemeanor. *See also infra* at 22-23 (discussing Government's refusal to accept state court records on the ground that they were not a formally certified copy).

aggravated felony because it corresponds to the "elements" of the federal felony provision. It reasons that "[a] criminal offense is defined by its statutory 'elements,' which consist of the facts that, absent a valid waiver, must be proved to a jury beyond a reasonable doubt to convict a defendant of the offense." U.S. Br. 19. That argument fails because the question here is not whether petitioner committed a particular "crime." Instead, the issue is whether petitioner's conviction was "punishable" – i.e., subject to punishment – as a "felony" rather than a misdemeanor. And under many federal statutes (including, most importantly, *this one*) the felony/misdemeanor line is not drawn based on the elements of the offense. Rather, it is drawn based on sentencing factors – here, whether the individual possessed more than a small amount of marijuana and distributed it for remuneration. Indeed, the Government successfully made that very argument in *Carachuri-Rosendo*, where it explained that sentencing factors *must* be considered because the statute asks how the conviction is "punishable": "to determine how an offense is 'punishable' under the CSA [Controlled Substances Act], a court must look *beyond the offense elements to sentencing factors* relevant to the particular offender." U.S. *Carachuri-Rosendo* Br. 30 (emphasis added).

The Government's contrary position simply makes no sense in the context of the application of the removal statute to 21 U.S.C. § 841(b). With respect to marijuana distribution, that provision defines a misdemeanor separately from the felony. Congress cannot have intended simultaneously to provide that only the "aggravated felony" would

trigger automatic deportation, but nonetheless *exclude* from the determination of what constitutes a felony the very provision – Section 841(b)(4) – that distinguishes it from a misdemeanor.

It is also extremely telling that the Government has no answer to the fact that Congress could not have had the distinction between elements and sentencing factors in mind with respect to the INA's application to Section 841. When the relevant provisions of the INA were first enacted, there was no such distinction with respect to Section 841. Before this Court's decision in *Apprendi*, it was widely accepted that all of the provisions of Section 841(b)(1) were sentencing factors. *See* Pet. Br. 30-31.

The Government nonetheless contends that this Court's precedents applying the categorical approach look exclusively to the "elements" of the offense. That is wrong. *Carachuri-Rosendo* is the only case in which this Court has considered the application of the categorical approach to sentencing factors, and in that case it rejected the Government's argument. The Solicitor General's theory in that case was that because the categorical approach is concerned only with offense "elements," it presented no obstacle to the immigration court making a separate finding of the sentencing factor of recidivism. Rejecting that argument, this Court squarely held that the predicate state conviction must itself embody each fact necessary to establish the federal felony – including when the felony is defined (as recidivist drug possession is) by sentencing factors rather than elements. 130 S. Ct. at 2586-87.

The Court in *Carachuri-Rosendo* specifically agreed with the Board of Immigration Appeals (BIA)

– whose rule it adopted – that "[w]hile most federal offenses are defined by elements that must be proved to a jury beyond a reasonable doubt, recidivist possession is an 'amalgam of elements, substantive sentencing factors, and procedural safeguards,'" and that the "facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as 'elements' in the traditional sense." 130 S. Ct. at 2583-84. The Government's protest that this language was in the background section of the Court's opinion, U.S. Br. 16, rings hollow. Not only is the quoted statement obviously correct and this Court plainly agreed with it, but the Government's brief in *Carachuri-Rosendo* made this very point: as noted, the Government explained that because the INA refers to how the offense is "punishable," it must account for sentencing factors. *See also id.* at 2590 (Scalia, J., concurring) ("That misdemeanor becomes a 'felony punishable under the Controlled Substances Act' only because the sentencing factor of recidivism authorizes additional punishment beyond one year, the criterion for a felony.").

No less important, the Court's holding in *Carachuri-Rosendo* squarely embodies that rule. The Court addressed a circumstance in which a state drug possession conviction actually included a recidivism finding. Such a conviction, the Court explained, would constitute an aggravated felony. 130 S. Ct. at 2585 n.10, 2587 n.12. The Solicitor General acknowledges and embraces that rule in this case. U.S. Br. 19 n.9. That holding is consistent *only* with the conclusion that the categorical approach applies to sentencing factors and is not limited to

elements. Under both state and federal law, recidivism is a sentencing factor. And that sentencing factor is specifically what renders a marijuana possession offense an "aggravated felony." 21 U.S.C. § 844. If the Government was correct that the categorical rule is limited only to elements, then a state court's finding of the recidivism sentencing factor would be irrelevant to the aggravated felony determination.

The Government asserts that *Carachuri-Rosendo* is properly distinguished because in that case *it* sought to go outside the record of conviction, whereas here it proposes a rule that would require the *non-citizen* to do so. U.S. Br. 11. The Government cannot prevail merely by shifting the burden of proof onto someone else. This Court's ruling in *Carachuri-Rosendo* did not rest on *which party* was introducing additional evidence, but instead on the recognition that under the INA the "conviction" – rather than facts later adduced in federal immigration proceedings – determines the status of the generic offense of "illicit trafficking."

The Government principally relies on a single passage from *Lopez v. Gonzales*, 549 U.S. 47 (2006), which states that "[a] state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Id.* at 57. As an initial matter, the quoted language was not even a statement of the categorical rule; instead, it was the Court's shorthand characterization of one purpose of a section of the INA providing that the statute "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43)(U). Nor did *Lopez* otherwise

embrace a distinction between federal elements and sentencing factors. In *Carachuri-Rosendo*, the Solicitor General recognized that this language from *Lopez* merely stands for the proposition that "if the state offense 'proscribes conduct' that may be punished as a felony under the CSA, that offense qualifies as an aggravated felony." U.S. *Carachuri-Rosendo* Br. 17-18.

Aside from taking that one sentence out of context, the Government fails to recognize the Court's several clear statements in *Lopez* that the categorical approach compares the statute of conviction with the requirements of the federal statute. The rule is not in any respect limited to offense elements. In holding that the designation of the offense under federal (not state) law as a felony controls under the INA, *Lopez* explained: "if we want to know what felonies might qualify, the place to go is to *the definitions* of crimes punishable as felonies under the CSA; where else would one naturally look?" 549 U.S. at 55 (emphasis added). The Court explained that "the crimes the CSA defines as 'felonies' are those crimes to which it *assigns a punishment* exceeding one year's imprisonment." *Id.* at 56 n.7 (emphasis added). Further, the Court held "that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60. In the relevant provisions of the CSA, it is sentencing factors that distinguish marijuana-related misdemeanors from felonies.

The Government next quotes this Court's statement in *Kawashima v. Holder*, 132 S. Ct. 1166 (2012), that "[i]f the elements of the offenses

establish that [the non-citizens] committed crimes involving fraud or deceit, then the first requirement of the [aggravated felony] is satisfied." *Id.* at 1172. By its terms, this language refers to the elements of the predicate offense, not the federal felony. Further, *Kawashima* did not involve any distinction between elements and sentencing factors. Rather, that quoted statement elaborated on the opinion's prior sentence, which the Government omits: "To determine whether the Kawashimas' offenses 'involv[e] fraud or deceit' within the meaning of Clause (i), we employ a categorical approach by looking to the *statute* defining the crime of conviction, *rather than the specific facts* underlying the crime." *Id.* (emphasis added).

The Government goes on to cite the Court's statement in *Gonzales v. Duenas-Alvares*, 549 U.S. 183 (2007), that "a state conviction qualifies as a burglary conviction . . . as long as it has the 'basic elements' of 'generic' burglary." *Id.* at 186. Again, that language refers to the predicate offense, not the federal felony. And the Court's reference to "basic elements" does not incorporate a distinction between offense elements and sentencing factors. The very next sentence, again ignored by the Solicitor General, explains that a court "should normally look *not to the facts* of the particular prior case, but rather to the state statute *defining the crime* of conviction." *Id.* (emphases added). Of course, the Government's argument in this case would require precisely the fact-bound inquiry that the language it quotes is actually intended to preclude. *See infra* at 10-24.

The Government equally errs in arguing that its position is furthered by *Nijhawan v. Holder*, which

held that a fraud provision of the INA applicable to a loss which "exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), was not subject to the categorical rule. 557 U.S. 29, 34, 36 (2009). The Court principally reasoned that the specific dollar amount was "circumstance-specific" and hence not subject to the categorical rule at all. *Id.* at 36. It also noted that few state statutes would correspond to that standard and that it was therefore unlikely that Congress would have intended the relevant provision of the INA to have such a limited effect. *Id.* at 30. Thus, the Court held that the provision was not subject to the categorical rule at all, but rather required an inquiry into the facts of the predicate offense. *Id.*

Here, the Government *admits* that (as this Court has repeatedly held) the INA's "illicit trafficking" provision is a generic offense that – in contrast to the fraud provision in *Nijhawan* – is subject to the categorical approach. U.S. Br. 9. And there is no doubt that the "illicit trafficking" provision applies to a great many cases. This is indeed the classic instance in which the categorical rule applies: many predicate convictions could correspond to either a misdemeanor or felony under federal law. The feature of state law on which the Government relies – that in many states it is not possible to know whether a conviction for possession with intent to distribute marijuana involves larger amounts or remuneration – does not suggest that Congress would have intended that such convictions would presumptively be deemed felonies.

III. The Government's Analogy To "Affirmative Defenses" Fails.

The Government argues that a decision in petitioner's favor would affect the removal of any non-citizen whose state conviction corresponds to a federal crime containing any "affirmative defense." U.S. Br. 32. The Government assumes that it would follow *ipso facto* from a ruling in petitioner's favor that no non-citizen would ever have to prove any defense to liability recognized under federal law.

That is not correct. The proper treatment of "affirmative defenses" under the categorical rule can be left for another day because Section 841(b)(4) is quite different. An affirmative defense distinguishes between lawful and unlawful conduct, excusing liability without rebutting the government's case in chief. Self-defense is a classic example: the government proves assault by showing an unprivileged touching, which the defense proves was necessary to protect the defendant.

Section 841(b) is very different. It distinguishes felonies from misdemeanors. It sets forth a number of different sentences applicable to cases depending on various factors, including particularly drug quantity. Nothing in the statute's structure suggests a congressional determination to make a special defense available under federal law. Rather, the felony and misdemeanor provisions are mutually exclusive of each other. *See* 21 U.S.C. §§ 841(b)(1)(D) (felony provision applies "except as provided in paragraph[] 4"), 841(b)(4) (misdemeanor provision applies "notwithstanding paragraph (1)(D)").

Nor is this otherwise an instance in which federal law recognizes a defense that state law rejects. Rather, the state statute is broader than a generic federal offense. Federal and state law are both concerned with the same facts – drug quantity and remuneration – but they draw different lines in terms of when a conviction arises. That is the classic instance in which the categorical rule applies.

The federal courts have held that defendants have the burden of proving the misdemeanor provision's applicability *not* because it appears in the statute as an exception or an affirmative defense, but as a result of the Sixth Amendment's requirements after *Apprendi*. U.S. Br. 21 ("[E]very court of appeals to have considered the question has held that, for *Apprendi* purposes, the statutory maximum penalty for possession of an unspecified amount of marijuana with intent to distribute is five years (under Section 841(b)(1)(D)), not one year (under Section 841(b)(4))—indicating that Section 841(b)(4) does not define the elements of any independent crime.").

There is no need to decide the applicability of the categorical rule to affirmative defenses, because the scenario the Government describes arises very rarely. Most "common-law affirmative defenses or mitigating exceptions" (for example, duress, self-defense, and insanity), U.S. Br. 34, are by their nature recognized by both state and federal law. The Government's concern instead arises only when federal law recognizes a defense that state law does not. When instead both recognize the defense, the state conviction establishes that the defense was not proven.

The Government discusses only two defenses that are even arguably implicated by its concern. One involves a provision of the INA that specifically places the burden of proof on the non-citizen. *See* 8 U.S.C. § 1101(a)(43)(P) (conviction for certain document-fraud crimes is an "aggravated felony," except for "a first offense for which the alien has affirmatively shown that the alien committed the offense" to assist a close family member). But the Government fails to recognize that this Court has squarely held that this provision is circumstance-specific and not subject to the categorical rule. *Nijhawan*, 557 U.S. at 30. Further, it seems clear that the non-citizen has the burden of proof under that provision.

That leaves the Government with the isolated exception for "antique" firearms. Under the INA, a non-citizen is removable if convicted of various crimes related to the possession or transfer of "a firearm." 8 U.S.C. § 1227(a)(2)(C). A non-citizen also commits an "aggravated felony" if convicted of "illicit trafficking in firearms." *Id.* § 1101(a)(43)(C). The term "firearm," however, excludes "an antique firearm," 18 U.S.C. § 921(a)(3), which is one "manufactured in or before 1898," a replica that uses antique ammunition, or a muzzle-loading weapon that uses black powder and "cannot use fixed ammunition," *id.* § 921(a)(16). Although the provision contains no express burden of proof, the courts that have examined the question have determined through statutory construction that Congress intended the burden to be on the defendant. *See United States v. Lawrence*, 349 F.3d 109, 122 (3d Cir. 2003) (describing consensus that Congress

intended firearms provision to operate as affirmative defense).

When the Court confronts the question, it may conclude that the firearms provision is distinguishable on any number of grounds. For example, the Government admits that there is only an "exceedingly remote possibility" that the defense would apply in any given case. U.S. Br. 33. On that basis, the Court may decide that the judgment of conviction need not preclude the exception's applicability because there must be "a realistic possibility, not a theoretical possibility" of the scenario the non-citizen describes. *Duenas-Alvarez*, 549 U.S. at 193. On that view, the remote hypothetical possibility that a state firearms conviction involved an antique firearm would not affect the conclusion that the conviction is an aggravated felony.

Also, as noted, as a matter of statutory construction, defendants bear the burden of proof in establishing the defense, and the Court may conclude that when Congress specifically provides a defendant with an opportunity to avoid liability by proving a fact that state law deems irrelevant, but places the burden of proof squarely on the defendant, it might follow that the non-citizen bears the same burden in the immigration context. The federal law definition, after all, provides the non-citizen with an *additional* right to avoid liability altogether that they did not have in the jurisdiction of conviction.

That said, a single approach may not govern all affirmative defenses. That is another reason to leave the question for another case in which it is actually presented. Imagine that a state eliminated a very

common defense that federal law continued to recognize – for example, self-defense, duress, or consent. It is unclear whether a non-citizen in such a case should bear the burden of proving the defense in the federal immigration proceedings.

IV. The Government's Attempt To Avoid The Gross Anomalies Of Its Position By Requiring Non-Citizens To Prove The Underlying Facts Of Their Cases Conflicts With This Court's Precedents And Is Completely Impractical.

Seemingly recognizing that its core position that under the categorical approach every marijuana distribution conviction is an aggravated felony "would produce unintended or unjust results," U.S. Br. 11, the Government now would append onto the categorical inquiry an assessment of the facts of the non-citizen's predicate offense. It argues that the "categorical" inquiry into the defendant's "conviction" must be followed by a second step in which the non-citizen attempts to prove that the facts of his offense correspond to a federal misdemeanor.

This argument has no textual basis whatsoever. The Government alleges that petitioner was convicted of "illicit trafficking," which this Court has squarely held is a "generic" offense subject to the categorical rule, not a fact-specific inquiry. *Carachuri-Rosendo*, 130 S. Ct. at 2586 n.11; *Nijhawan*, 557 U.S. at 37. The Government cannot seriously both argue that the application of Section 841(b)(4) must be decided "under the categorical approach," U.S. Br. 9, which *forbids* an inquiry into "the particular facts of the crime that led to the

conviction," *id.* 14, and at the same time urge this Court to adopt an open-ended inquiry into the facts of the predicate offense.

The Government's assertion that this "subsequent, 'circumstance-specific' inquiry does not contravene the categorical approach but rather operates outside of it," *Id.* 10, is sophistry. The categorical approach is directed at a distinct question: how the predicate offense is "generally committed," *Nijhawan*, 557 U.S. at 34, in "the ordinary case," *James*, 550 U.S. at 208. But the Government's proposal would shift the focus of the inquiry and completely reduce the "categorical" assessment of the conviction to an empty, temporary, *pro forma* exercise in a huge proportion of cases.

Also, as this Court has stressed over and over in rejecting similar arguments by the Government, a principal point of the categorical approach is to resolve the case without time-consuming and indeterminate assessments of the facts of each case. *See* Pet. Br. 33 (citing *Kawashima*, 132 S. Ct. at 1172); *Duenas-Alvarez*, 549 U.S. at 186; *Begay v. United States*, 553 U.S. 137, 141 (2008); *Taylor*, 495 U.S. at 600-02). But the Government continues to refuse to listen. Its proposal in this case would reduce the categorical inquiry into a mere presumption, which can be defeated in every case by *precisely* the fact-bound inquiry that its very point is to avoid.

The Government also ignores that this Court expressly rejected an indistinguishable argument by the United States in *Carachuri-Rosendo*. There, the Solicitor General unsuccessfully argued for an indistinguishable *"two-part inquiry"*: (i) a

determination whether the "elements" of the state and federal offenses correspond under the "categorical approach"; followed by (ii) a further inquiry into whether the facts of the case reveal that the non-citizen was a recidivist. Tr. of Oral Arg. 44 (Assistant to the Solicitor General) (emphasis added). This Court rejected that approach, holding instead that because the INA views "conviction" and "illegal trafficking" as a "generic" offense, the fact of conviction itself must establish the correspondence to the federal felony. 130 S. Ct. at 2586-87.

The Government's proposed factual inquiry is irreconcilable with the statute in another respect. The question under the INA is whether the non-citizen's conviction corresponds to a federal felony. But as the United States itself emphasizes, many convictions result from plea agreements that deviate from the more serious facts of the case. U.S. Br. 29. Yet the Government contemplates that immigration officials will base their decisions on the *facts of the underlying conduct*, not the often more lenient basis for the *conviction*.[2]

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[2] At the very least, petitioner would be entitled to a remand to the BIA for the opportunity to present the relevant evidence. Because the BIA did not apply the standard the Solicitor General now advocates, the agency's judgment cannot be affirmed on that basis; at the very least the case must be returned to the BIA for application of its new standard. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Petitioner had no notice of that rule and was under no obligation to introduce the evidence at that time. The Solicitor General's passing suggestion that petitioner should instead file a motion to reopen the proceedings ignores the material restrictions on that

It is thus not even remotely "hyperbole" to point out that the Government's position could implausibly render a "misdemeanor" conviction under Section 841(b)(4) an "aggravated felony." *Contra* U.S. Br. 37 n.24. That is the inevitable consequence of the Government's understanding of the categorical approach, because Section 841(b)(4) is not an "element" of the offense. At the certiorari stage, the Government frankly called Section 841(b)(4) "irrelevant in using a 'categorical approach.'" BIO 7.

At the merits stage, the Government now insists that in its proposed later stage of the immigration proceedings, a non-citizen convicted under Section 841(b)(4) could prove the misdemeanor status of his offense based "on the sentencing judgment alone." U.S. Br. 37 n.24. But why? What is the basis for privileging that judgment over the facts of the case found by an immigration judge? On the next page of its brief, the Government insists that the inquiry is *not* actually "limited to documents from the conviction record," but instead extends to "other probative evidence" like "[p]olice and laboratory reports." *Id.* 38. Immigration authorities would seemingly be free to conclude that although the non-citizen was permitted to plead to a misdemeanor, the actual facts showed that he possessed a larger quantity of drugs or received remuneration.

The Government also dramatically understates the impracticality of the rule it would adopt. Non-

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procedural mechanism. *See, e.g.*, 8 U.S.C. § 1229a(c)(7)(c)(i) (motions to reopen are subject to 90-day time limit).

citizens charged with drug crimes are generally placed in immigration detention, 8 U.S.C. § 1126(c)(1)(B), where they lack ready access to records of earlier criminal proceedings. They frequently have no lawyer or access to any modern communication tools. In any event, the evidence in question often will not be a part of the state court record, because it was irrelevant to the state charges. And the predicate offense may have occurred many years before. *See Amicus* Br. of Center on the Administration of Criminal Law 8-17. The witnesses will have scattered to the winds. To take a simple example, the Government has no explanation of how a jailed non-citizen would locate and persuade to testify under oath the casual acquaintance with whom he shared a single marijuana cigarette five years before on the other side of the country. *See* Pet. Br. 31-37.[3]

The Government is far too dismissive of still other serious concerns. In this very case, it maintained that the records from the state proceedings were inadmissible because they were not properly authenticated. *Id.* 35. Importantly, many immigration officers must make "aggravated felony" determinations with no adversarial proceedings *at all*. *Id.* 37 n.6. The United States completely fails to

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[3] The fact that non-citizens may receive advice regarding the immigration consequences of their state court plea agreements, U.S. Br. 38 (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010)), has little to nothing to do with whether the evidence is placed into the state court record to which it is not relevant.

explain how they will do so. All the officials involved in these proceedings are grossly overworked, and adding retrials of minor marijuana offenses to their responsibilities can only spread greater injustice across their entire dockets. *See generally* Br. of *Amicus* National Immigrant Justice Center et al.

It is also far more practicable to treat such convictions as controlled substance offenses, and permit the Attorney General to deny cancellation of removal of an alien in appropriate cases, such as those involving larger drug quantities. The record of the predicate conviction is vastly more likely to contain reliable evidence of drug quantity in cases involving serious offenses, so the Attorney General should have little difficulty learning the relevant facts when removal is most likely to be warranted. That is in addition to the fact that the BIA almost always has more resources available to it and greater sophistication than the non-citizen. By contrast, the Government would require non-citizens to provide evidence that no party will have bothered to retain, much less place in the trial record, precisely because it is so trivial – that only a small amount of marijuana was involved, and that it was merely shared socially.[4]

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[4] The Government asserts that because Georgia defines possession with intent to distribute marijuana as a felony, it would prevail under the view expressed by Justice Thomas in dissent in *Lopez*. That is incorrect. Under Georgia law, no conviction *at all* was entered in petitioner's case. Ga. Code Ann. § 42-8-62; *Gunter v. State*, 356 S.E.2d 276, 277 (Ga. Ct. App. 1987); *Favors v. State*, 214 S.E.2d 645, 651 (Ga. 1975).

Petitioner thus was not convicted of a felony as far as the State of Georgia is concerned.

But in any event, there is no reason to adhere to that dissent. *Lopez* is now long-settled, and no party (including the Government) asks the Court to revisit *Lopez* in this case. The United States does not ask the Court to "overrule [*Lopez*] and thus do[es] not seek to overcome the presumption of *stare decisis*." *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1267 (2012). To the contrary, as in every other recent case, the United States embraces *Lopez*. U.S. Br. 13. There is no basis to affirm the judgment below on the basis of a position to which the Government does not adhere. *See, e.g.*, *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1180-81 (2010) (per curiam) (Thomas, J., concurring); *MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 34 (2008) (Thomas, J., concurring); *Georgia v. Ashcroft*, 539 U.S. 461, 492 (2003) (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Angel L. Arias
ARIAS LAW GROUP, P.A.
2323 Hollywood Blvd.
Hollywood, FL 33020

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

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AMICUS CURIAE BRIEF

No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, AS AMICUS CURIAE SUPPORTING PETITIONER

RACHEL E. BARKOW
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 992-8829

WAYNE L. STONER
Counsel of Record
ANNA E. LUMELSKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
wayne.stoner@wilmerhale.com

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§ 18-18-406(5) 6

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Haw. Rev. Stat.
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§ 706-663 5

Idaho Code Ann. § 37-2732(a)(1)(B) 9, 10

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Ind. Code
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Iowa Code § 124.401(1)(d) 9

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La. Rev. Stat. Ann. § 40:966(A)(1) 9, 10

Me. Rev. Stat. tit. 17-A,
§ 1106(1-A)(D) 5, 9, 10
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§ 1252(2)(D) 5

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Mich. Comp. Laws § 333.7410(7) 5, 10

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§ 40-35-111(e)(1) 6

Tex. Health & Safety Code Ann.
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Tex. Penal Code Ann. § 12.22 5

Utah Code Ann. § 58-37-8(1)(a) 9, 10

Vt. Stat. Ann. tit. 18, § 4230(b)(2) 9

Va. Code Ann.
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W. Va. Code § 60A-4-401(a) 9, 10

Wis. Stat. § 961.41(1) 9

Wyo. Stat. Ann. § 35-7-1031(a) 9, 10

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf 13

American Council of Chief Defenders, *Statement on Caseloads and Workloads* (Aug. 2007), *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf 11

Boruchowitz, Robert C., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (Apr. 2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 ..... 11, 12

Criminal Court of the City of New York, *Annual Report 2009* (July 2010), *available at* http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf 12

Eckholm, Erik, *Citing Workload Public Lawyers Reject New Cases*, N.Y. Times, Nov. 9, 2008, at A1 12

TABLE OF AUTHORITIES—Continued

Page(s)

Executive Office of Immigration Review, *FY 2010 Statistical Year Book* (Jan. 2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf 8

Farole, Donald J., & Lynn Langton, Bureau of Justice Statistics, *County-based and Local Public Defender Offices, 2007* (Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf 12

Geller, Amanda, & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. Empirical Legal Stud. 591 (2010) 15

Harlow, Caroline Wolf, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf 11

Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* (July 2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf 13

LaFountain, Robert C., et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx 11

TABLE OF AUTHORITIES—Continued

Page(s)

Markowitz, Peter L., *Barriers to Representation for Detained Immigrants Facing Deportation; Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541 (2009) 15

Massachusetts Sentencing Commission, *Survey of Sentencing Practices FY 2009* (June 2010), *available at* http://www.mass.gov/courts/admin/sentcomm/fy2009survey.pdf 7

Missouri Sentencing Advisory Commission, *User Guide 2011-2012* (Apr. 2012), *available at* http://www.mosac.mo.gov/file.jsp?id=45394 7

National Legal Aid & Defender Association, *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* (June 2008), *available at* http://www.mynlada.org/michigan/michigan_report.pdf 12

New York State Division of Criminal Justice Services, *New York State Arrests Disposed by Charge* (Apr. 2012) 7

New York State Division of Criminal Justice Services, *Prison And Jail Terms Imposed For Convictions From Selected Arrests* (Apr. 2012) 7

Pallasch, Abdon M., *Call to Limit Cases Amuses Public Defenders*, Chi. Sun-Times, July 24, 2006, at 18 12

TABLE OF AUTHORITIES—Continued

Page(s)

Roberts, Jenny, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277 (2011) 11, 12

The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services* (June 2006), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf 14

Vastine, Michael S., *Give Me Your Tired, your Poor ... and Your Convicted? Teaching "Justice" to Law Students by Defending Criminal Immigrants in Removal Proceedings*, 10 U. Md. L.J., Race, Religion Gender & Class 341 (2010) 15

Wright, Charles Alan, & Kenneth W. Graham, Jr., *Federal Practice and Procedure* (2d ed. 2005) 17

INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law, New York University School of Law (the "Center")[2] is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is particularly concerned with assisting courts in gaining a better understanding of how the criminal justice process works on the ground. In this case, that knowledge is critical. The Fifth Circuit's opinion below suggests that defendants could establish small drug quantity and lack of remuneration during prosecution of their state crimes, but that view is inconsistent with the reality of how these cases are processed. This brief describes that reality to assist the Court's evaluation of the opinion below.

SUMMARY OF ARGUMENT

A review of state marijuana distribution laws demonstrates that the Fifth Circuit's holding in this case

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] New York University School of Law is named here solely to identify the Center's affiliation. The views expressed in this brief should not be regarded as the position of the Law School.

conflicts with the goals of state criminal justice systems, fails to take into account how state drug offenses are prosecuted, and leads to inequalities by jurisdiction.

First, the Fifth Circuit's approach would equate minor state drug offenses with serious federal drug felonies, a position contrary both to this Court's precedents and to the interests and expectations of state criminal justice systems.

Second, the suggestion that defendants in low-level state drug cases could establish small drug quantity and lack of remuneration during prosecution of their state crimes is not consistent with the reality of state drug prosecutions. Defendants charged with such offenses tend to move through the system quickly, with minimal procedural protections, and with plea bargaining or summary proceedings to resolve their cases. Moreover, drug quantity and remuneration are irrelevant to many state distribution laws. Defendants therefore have neither a reason nor an opportunity to develop such evidence in state court prosecutions.

Third, the approach of the Fifth Circuit would lead to different deportation outcomes for different defendants based solely on the particular state in which they were convicted.

ARGUMENT

I. THE FIFTH CIRCUIT EQUATES MINOR STATE DRUG OFFENSES WITH SIGNIFICANT FEDERAL DRUG TRAFFICKING VIOLATIONS, CONTRARY TO THIS COURT'S PRECEDENT AND THE GOALS AND EXPECTATIONS OF STATE CRIMINAL JUSTICE SYSTEMS

The position of the Fifth Circuit is that immigrants convicted under state laws that encompass both conduct punishable under 21 U.S.C. § 841(b)(4) (distribu-

tion of a "small amount" of marijuana for no remuneration, a misdemeanor) and other § 841 conduct (a felony) will be presumed to have committed the felony-level offense for immigration purposes, absent evidence to the contrary. Thus, to the extent that state laws encompass both types of conduct, the Fifth Circuit would essentially treat misdemeanor and felony drug offenders as equivalent for immigration purposes.

That approach is not consistent with *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2585, 2589 (2010), in which this Court declined to categorize petitioner's nontrafficking drug possession offense as a "drug trafficking crime" for purposes of immigration law. Applying the "commonsense" approach of *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006), the Court ruled it unreasonable to equate possession of a small amount of a prescription drug with a felony "drug trafficking crime" under federal law. *Carachuri-Rosendo*, 130 S. Ct. at 2585; *see also Lopez*, 549 U.S. at 53 (holding that treating a simple possession offense as illicit trafficking under the immigration laws would be "incoheren[t] with any commonsense conception of 'illicit trafficking,'" which ordinarily refers to "some sort of commercial dealing"). The *Carachuri-Rosendo* Court noted that the conduct in question was punished by 10 days in jail, while federal felonies are punishable by at least one year in prison—and often much longer. *Carachuri-Rosendo*, 130 S. Ct. at 2580, 2585.

The same "commonsense" analysis defeats the government's position here. Possession of up to 50 kilograms (i.e., 50,000 grams) of marijuana with intent to distribute under the applicable federal provision is punishable by up to five years in prison and a $250,000 fine. *See* 21 U.S.C. § 841(b)(1)(D). Distribution of a small amount of marijuana for no remuneration under 21

U.S.C. § 841(b)(4), however, is treated like simple possession under 21 U.S.C. § 844, punishable by no more than one year in prison and a $1000 fine. The federal statutory structure thus clearly distinguishes between the two categories of conduct, and the Fifth Circuit's conflation of them is improper.

State laws that encompass § 841(b)(4) conduct tend to prescribe light punishments, underscoring the disproportionate nature of the Fifth Circuit's approach. Applying felony standards to convictions that the states consider only minor offenses is contrary to the goals and intentions of state criminal justice systems.

Notably, states whose penal codes separately punish non-remunerative distribution of a "small amount" of marijuana[3]—encompassing solely § 841(b)(4) conduct—tend to prescribe minor penalties for these offenses, such as fines and little or no confinement.[4]

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[3] The Board of Immigration Appeals has held that, while there is no fixed quantity that is always considered "a small amount" under § 841(b)(4), the quantity of 30 grams (or a little over an ounce) "serve[s] as a useful guidepost" in considering the issue. *See Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 703 (BIA 2012). This brief will use 30 grams as a benchmark for a "small amount" under § 841(b)(4).

[4] *See* Cal. Health & Safety Code § 11360(b) (non-remunerative distribution of not more than 28.5 grams of marijuana, punishable by fine of not more than $100); 720 Ill. Comp. Stat. 550/6 ("casual delivery" of cannabis—non-remunerative distribution of less than ten grams—treated as possession, punishable by not more than six months imprisonment, fine not to exceed $1500, or both, *see id.* 550/3(b), 550/4(b); 730 Ill. Comp. Stat. 5/5-4.5-60); N.M. Stat. Ann. § 30-31-22(E) (non-remunerative distribution of "a small amount" of marijuana ("small amount" not defined), punishable by fine of up to $100 and up to fifteen days imprisonment, *see id.* § 30-31-

Moreover, even those state laws that encompass *both* certain § 841(b)(4) conduct *and* certain other § 841 conduct often provide solely for misdemeanor-level punishments. In at least thirteen states and the District of Columbia, such offenses are punishable by no more than one year of incarceration.[5] For some of

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23(B)(1)); N.Y. Penal Law § 221.35 (non-remunerative distribution of two grams or less of marijuana, punishable by up to three months imprisonment); N.C. Gen. Stat. § 90-95(b)(2) (non-remunerative distribution of less than five grams of marijuana, any sentence of imprisonment must be suspended, *see id.* § 90-95(d)(4)); Ohio Rev. Code Ann. § 2925.03(C)(3)(h) (non-remunerative distribution of less than twenty grams of marijuana, punishable by up to $150 fine, *see id.* § 2929.28(A)(2)(a)(v)); Or. Rev. Stat. § 475.860(3)(a) (non-remunerative distribution of less than one ounce of marijuana, punishable by up to one year imprisonment); 35 Pa. Cons. Stat. § 780-113(a)(31), (g) (non-remunerative distribution of up to thirty grams of marijuana, punishable by up to 30 days imprisonment, fine of up to $500, or both); S.D. Codified Laws § 22-42-7 (non-remunerative distribution of less than one-half ounce of marijuana, punishable by not less than fifteen days in county jail); Tex. Health & Safety Code Ann. § 481.120(b)(1) (non-remunerative distribution of one-fourth ounce or less of marijuana, punishable by fine of up to $2000, up to 180 days in jail, or both, *see* Tex. Penal Code Ann. § 12.22).

[5] *See* Alaska Stat. § 11.71.050(a)(1), (b) (punishable by up to one year imprisonment, *see id.* § 12.55.135(a)); Colo. Rev. Stat. § 18-18-406 (subject to a fine only, *see id.* § 18-1.3-503(1)); D.C. Code § 48-904.01(a)(2)(B) (punishable by imprisonment for not more than 180 days, fine of not more than $1000, or both); Haw. Rev. Stat. § 712-1248(1)(d), (2) (punishable by up to one year imprisonment, *see id.* § 706-663); Ind. Code § 35-48-4-10(a) (punishable by up to one year imprisonment, *see id.* § 35-50-3-2); Ky. Rev. Stat. Ann. § 218A.1421(2)(a) (punishable by up to one year imprisonment, *see id.* § 532.090(1)); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D) (punishable by less than one year in county jail, *see id.* § 1252(1)(A), (2)(D)); Mich. Comp. Laws § 333.7410(7) (punishable by up to one year imprisonment); Minn. Stat. §§ 152.027(4)(a),

these offenses, the prescribed punishment is much lower. *See*, Colo. Rev. Stat. § 18-18-406(5) (subject to a fine only, *see id.* § 18-1.3-503(1)); D.C. Code § 48-904.01(a)(2)(B) (punishable by imprisonment for not more than 180 days, fine of not more than $1000, or both); Minn. Stat. §§ 152.027(4)(a), 152.01(16) (punishable by requirement to participate in drug education program); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (punishable by "community control sanction," unless specified factors suggest incarceration, *see id.* § 2929.13(B)(1)(a)).

In addition, actual state sentences under the applicable provisions are often significantly lower than the maximum allowed. The petitioner in this case, for example, was charged under a Georgia statute that provides for a penalty of one to ten years. Ga. Code Ann. § 16-13-30(j). However, he received only probation under the state First Offender Act, *see id.* § 42-8-62.

Such facts are not unusual. In New York, between 2005 and 2011, there were over 20,000 convictions under New York Penal Law § 221.40, which criminalizes distribution of marijuana (except non-remunerative

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152.01(16) (punishable by requirement to participate in drug education program); N.Y. Penal Law § 221.40 (punishable by up to one year imprisonment, *see id.* § 70.15(1)); N.C. Gen. Stat. §§ 90-95(b)(2), 15A-1340.17 (punishable by 3-8 months imprisonment); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (punishable by "community control sanction" unless specified factors suggest incarceration, *see id.* § 2929.13(B)(1)(a)); Tenn. Code Ann. § 39-17-418(a)-(c) (punishable by up to 11 months, 29 days imprisonment or fine of up to $2500, or both, *see id.* § 40-35-111(e)(1)); Va. Code Ann. § 18.2-248.1(a)(2) (if lack of remuneration is shown, punishable by confinement in jail for up to 12 months or fine of up to $2500, or both, *see id.* § 18.2-11(a)).

distribution of less than two grams or one marijuana cigarette, which is separately addressed in § 221.35). *See* New York State Division of Criminal Justice Services, *New York State Arrests Disposed by Charge* (Apr. 2012). Conviction under § 221.40 is punishable by a prison term of up to one year. N.Y. Penal Law § 70.15(1). However, of the over 20,000 convictions between 2005 and 2011, about 75 percent resulted in sentences of time served only, probation only, conditional discharge, or fines. *See New York State Arrests Disposed by Charge.* And of the 25 percent of convictions that resulted in incarceration, more than 75 percent were for 30 days or less. *See* New York State Division of Criminal Justice Services, *Prison And Jail Terms Imposed For Convictions From Selected Arrests* (Apr. 2012).[6] Similarly, in Massachusetts, in fiscal year 2009, only 35 percent of defendants convicted of distribution of class D drugs (including marijuana) were incarcerated. *See* Massachusetts Sentencing Commission, *Survey of Sentencing Practices FY 2009*, at 90 (June 2010), *available at* http://www.mass.gov/courts/admin/sentcomm/fy2009survey.pdf. In Missouri, a 2012 Sentencing Commission User Guide recommends probation for typical offenders with no prior felony convictions under an applicable state marijuana distribution law. *See* Missouri Sentencing Advisory Commission, *User Guide 2011-2012*, at 105 (Apr. 2012), *available at* http://www.mosac.mo.gov/file.jsp?id=45394.

As these figures make clear, states often treat defendants convicted of offenses encompassing § 841(b)(4) conduct as minor offenders. Nonetheless, the Fifth

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[6] All New York State Division of Criminal Justice Services data on file with author.

Circuit would label these defendants as *prima facie* "aggravated felons" subject to the serious consequence of mandatory deportation unless they can put forward proof as to both lack of remuneration and small drug quantity. Such proof will often be difficult or impossible to obtain, as described below. *See* Part II, *infra*. The position of the Fifth Circuit will thus lead to mandatory deportation in many such cases. This result is wholly inconsistent with the goals and expectations of state criminal justice systems with respect to minor offenders.

II. DEFENDANTS CHARGED WITH LOW-LEVEL STATE MARIJUANA OFFENSES OFTEN HAVE NO OPPORTUNITY OR REASON TO ESTABLISH SMALL QUANTITY OR LACK OF REMUNERATION

Under the Fifth Circuit's holding, immigrants whose state marijuana offenses involve non-remunerative distribution of small amounts of marijuana must prove these facts when they are charged in order to avoid being incorrectly categorized as aggravated felons in later immigration proceedings. But in most states, the prosecution of low-level marijuana offenses provides neither a reason nor an opportunity to establish such facts in the criminal proceedings.[7]

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[7] Nor do most immigrants in removal proceedings have any real opportunity to develop such evidence. Of immigrants whose immigration proceedings were completed in 2010, 57 percent were not represented and 44 percent were detained. *See* Executive Office of Immigration Review, *FY 2010 Statistical Year Book* G1, O1, (Jan. 2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf; *see also* Brief of Amici Curiae National Immigrant Justice Center, et al. (discussing obstacles immigrants face in removal proceedings).

Remuneration is irrelevant to applicable marijuana distribution offenses in at least 39 states, as well as in the District of Columbia and Puerto Rico.[8] Drug quantity is irrelevant to applicable marijuana distribution

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[8] *See* Ala. Code § 13A-12-211(a); Alaska Stat. § 11.71.050(a)(1); Ariz. Rev. Stat. Ann. § 13-3405(A)(4); Conn. Gen. Stat. § 21a-277(b); Del. Code Ann. tit. 16, § 4754(1); D.C. Code § 48-904.01(a)(2)(B); Fla. Stat. § 893.13(1)(a); Ga. Code Ann. § 16-13-30(j); Haw. Rev. Stat. § 712-1248(1)(d); Idaho Code Ann. § 37-2732(a)(1)(B); 720 Ill. Comp. Stat. 550/5; Ind. Code Ann. § 35-48-4-10(a); Iowa Code § 124.401(1)(d); Kan. Stat. Ann. § 21-5705(a)(4); Ky. Rev. Stat. Ann. § 218A.1421(2)(a); La. Rev. Stat. Ann. § 40:966(A)(1); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D); Md. Code Ann., Crim. Law § 5-602; Mass. Gen. Laws ch. 94C, § 32C(a); Miss. Code Ann. § 41-29-139(a)(1); Mo. Rev. Stat. § 195.211; Mont. Code Ann. § 45-9-101(4); Neb. Rev. Stat. § 28-416(1)(a); Nev. Rev. Stat. § 453.321(1); N.H. Rev. Stat. Ann. § 318-B:26(1)(d)(1); N.J. Stat. Ann. § 2C:35-5(a)(1); N.Y. Penal Law §§ 221.40, 221.45 (*see also id.* § 220.00(1) (defining "[s]ell" to include "give or dispose of to another")); N.D. Cent. Code § 19-03.1-23(1)(b); Ohio Rev. Code Ann. § 2925.03(C)(3)(a) (*see also id.* § 3719.01(AA) (defining "[s]ale" to include "transfer, or gift")); Okla. Stat. tit. 63, § 2-401(A)(1); P.R. Laws Ann. tit. 24, § 2401(a); R.I. Gen. Laws § 21-28-4.01(a)(4)(i); S.D. Codified Laws § 22-42-7 (remuneration irrelevant for quantities over one-half ounce); Tenn. Code Ann. §§ 39-17-417(a), -418(a), (b) (*see Tennessee* v. *Copeland*, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998) (holding that "[m]oney may or may not be involved" in a "casual[] exchange" under § 39-17-418(a)); Tex. Health & Safety Code Ann. § 481.120(a) (remuneration irrelevant for quantities over one-fourth ounce, *see id.* § 481.120(b)); Utah Code Ann. § 58-37-8(1)(a); Vt. Stat. Ann. tit. 18, § 4230(b)(2); Wash. Rev. Code § 69.50.401(1); W. Va. Code § 60A-4-401(a); Wis. Stat. § 961.41(1); Wyo. Stat. Ann. § 35-7-1031(a); *see also* Ark. Code Ann. §§ 5-64-436, -438, -101(7) (although statutory definition of "deliver" suggests application to remunerative transfers only, case law appears to have expanded definition to include some non-remunerative transfers, *see, e.g.*, *Anderson* v. *Arkansas*, 630 S.W.2d 23, 23-24 (Ark. 1982)).

offenses in at least 23 states and in Puerto Rico.[9] State prosecutors charging these crimes have no reason to introduce remuneration or drug quantity evidence to prove the elements of the offense. Defendants have no reason to introduce such evidence to defend against the criminal charges. Nor do state courts have any reason to accommodate defendants wishing to develop such evidence irrelevant to the charge at issue, even if defendants seek to do so. Therefore, there is often no avenue for the issue to come up at all.

Further, any defendant who could collect and present such evidence would generally have no meaningful opportunity to do so for another reason. The offenses at issue here—distribution of a small amount of marijuana for no remuneration—are minor crimes that are often quickly processed and disposed of in state courts, with minimal process and penalties. The routine processing of such charges does not generally allow for detailed development of evidence.

Misdemeanors—a category that includes many of the state offenses at issue here, *see* n.5, *supra*—make

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[9] *See* Ala. Code § 13A-12-211(a); Conn. Gen. Stat. § 21a-277(b); Del. Code Ann. tit. 16, § 4754(1); Fla. Stat. § 893.13(1)(a); Ga. Code Ann. § 16-13-30(j)(1); Haw. Rev. Stat. § 712-1248(1)(d); Idaho Code Ann. § 37-2732(a)(1)(B); La. Rev. Stat. Ann. § 40:966(A)(1); Me. Rev. Stat. tit. 17-A, § 1106(1-A)(D); Md. Code Ann., Crim. Law § 5-602; Mass. Gen. Laws ch. 94C, § 32C(a); Mich. Comp. Laws § 333.7410(7); Mont. Code Ann. § 45-9-101(4); Neb. Rev. Stat. § 28-416(1)(a); Nev. Rev. Stat. § 453.321(1); N.D. Cent. Code § 19-03.1-23(1)(b); Okla. Stat. tit. 63, § 2-401(A)(1); P.R. Laws Ann. tit. 24, § 2401(a); R.I. Gen. Laws § 21-28-4.01(a)(4)(i); S.C. Code Ann. § 44-53-370(a); Utah Code Ann. § 58-37-8(1)(a); Wash. Rev. Code § 69.50.401(1); W. Va. Code § 60A-4-401(a); Wyo. Stat. Ann. § 35-7-1031(a).

up the vast bulk of the criminal docket in state courts. *See* LaFountain, et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* 47 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx. The pressure to process these high volume cases quickly is strong. *See, e.g.*, Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 306-307 (2011).

The limited time available to state public defenders adds to the pressure to process low-level cases quickly.[10] Although many authorities suggest that each public defender's caseload should not exceed 400 misdemeanors annually, *see, e.g.*, American Council of Chief Defenders, *Statement on Caseloads and Workloads* 1, 3 (Aug. 2007), *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf (citing 1973 recommendations of National Advisory Commission on Criminal Justice Standards and Goals:

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[10] While comprehensive national figures on representation by counsel of defendants charged with state misdemeanors are lacking, a 1996 Department of Justice survey of jail inmates indicated that more than half of the inmates charged with misdemeanors had court-appointed counsel, and nearly two-thirds of the remainder were proceeding *pro se*. *See* Harlow, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* tbl. 13 (Nov. 2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf; *see also* Boruchowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 14-15 (Apr. 2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 (describing empirical evidence indicating a large percentage of unrepresented state misdemeanor defendants).

Courts ("NAC Standards")), the evidence suggests that most public defenders far exceed this level. For example, a government study reported that, in 2007, 73 percent of county-based public defender offices exceeded the NAC Standards. Farole & Langton, Bureau of Justice Statistics, *County-based and Local Public Defender Offices, 2007*, at 1 (Sept. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf; *see also* Boruchowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 20-22 (Apr. 2009), *available at* www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 (describing overwhelming public defender misdemeanor caseloads in many jurisdictions); Pallasch, *Call to Limit Cases Amuses Public Defenders*, Chi. Sun-Times, July 24, 2006, at 18; Eckholm, *Citing Workload Public Lawyers Reject New Cases*, N.Y. Times, Nov. 9, 2008, at A1; *Why Misdemeanors Matter*, 45 U.C. Davis L. Rev. at 279-280 (stating that in Detroit, Michigan, attorneys from a public defender service cover from 2400 to 2800 misdemeanors per year).

As a result of these pressures, low-level state criminal cases are routinely disposed of as early as the first court appearance. A 2009 New York Criminal Court report stated that, in New York City, "slightly less than half of all case filings were disposed of at their initial court appearance," and "[a]lmost all of these dispositions involved misdemeanor or other petty offenses." Criminal Court of the City of New York, *Annual Report 2009*, at 29 (July 2010), *available at* http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf; *see also* National Legal Aid & Defender Association, *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* 15 (June 2008), *available at* http://www.mynlada.org/michigan/

michigan_report.pdf (describing a common scenario in Michigan in which "clients are arraigned, pretrial conferences held, and, if a plea can be worked with the clients, sentences imposed generally all in a single day without defense counsel present").

In addition, a defendant represented by a public defender and charged with a misdemeanor or other low-level state offense may have minimal or no contact with counsel before the case is (often quickly) concluded, with no time for the development or investigation of evidence. *See* Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* 13 (July 2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf ("In many jurisdictions across the country defenders meet with their clients minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client."); American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 16 (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf ("Witnesses recounted numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing."). One report describes arraignments for minor crimes in New York City:

> [L]arge percentages of misdemeanor, violation and infraction cases plead out at arraignment,

> often times after a lawyer has met with his or her client for only a couple of minutes. Attorneys are generally only armed with the charging document, defendant's rap sheet and the "[New York City Criminal Justice Agency] form." During these few minutes, attorneys are expected to assess whether to recommend the defendant plead or not, consult with the defendant and fully advise him or her of the consequences of pleading to a criminal charge, including all of the collateral consequences that come along with having a criminal conviction, such as housing, state and federal assistance and immigration issues. ... [T]he pressure in New York City to dispose of cases is so strong, as a result of the sheer volume of cases that the courts process in any given day, that the focus becomes on pleas only.

The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services* 143 (June 2006) (footnote omitted), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

As these sources make clear, the prosecution of low-level state drug offenses is not a reasonable forum for the development of evidence relevant to possible future federal immigration proceedings, particularly when that evidence is not relevant to the criminal charge.

In addition, immigrants arrested for marijuana offenses often lack the personal resources and education necessary to muster a strong defense. Marijuana arrests are often targeted in poor and

minority communities. *See* Geller & Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. Empirical Legal Stud. 591, 593 (2010) (In New York City, "[s]treet stops are conducted predominantly in poor neighborhoods with high concentrations of black and Hispanic residents ... and marijuana arrests are clustered in many of the same neighborhoods."). Immigrants as a group tend to be less educated and poorer than the general population. *See* Vastine, *Give Me Your Tired, Your Poor ... and Your Convicted? Teaching "Justice" to Law Students by Defending Criminal Immigrants in Removal Proceedings*, 10 U. Md. L.J. Race, Religion, Gender & Class 341, 349 (2010) ("The educational level of the first generation immigrant is typically lower-than-average and a look at the wealth disparity of most first generation immigrants relative to the general population reveals a population more socio-economically vulnerable to both heavy policing and poor legal representation." (footnote omitted)); Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 551 (2009) ("Fifty-two percent of the foreign-born population are limited English proficient. ... [T]hey are disproportionately poor and they are significantly more likely to be lacking in basic education." (footnote omitted)).

Immigrants prosecuted for low-level state marijuana offenses are thus uniquely ill-suited for the task of developing quantity and remuneration evidence that may be helpful in a future removal proceeding. Given these realities, the suggestion that immigrants will be protected from unjustified deportation because they can develop the necessary evidence in state court is simply unfounded.

III. Under The Fifth Circuit's Approach, Outcomes For Immigrants Would Differ Based Only On The Forum Of Conviction

The dilemma facing the petitioner in this case arose because he happened to be charged under a state statute that encompasses both federal felony and federal misdemeanor conduct. Under the Fifth Circuit's approach, this led to a presumption that petitioner was guilty of federal felony conduct. Because quantity and remuneration were not relevant to his state offense, evidence on these points was not admitted during his state prosecution.

Such a dilemma should not arise for defendants charged under federal law because quantity and remuneration are clearly relevant to the offense. Similarly, such a dilemma should not arise for defendants charged under state laws that punish non-remunerative distribution of "small" amounts of marijuana separately from other types of distribution. *See* n.4, *supra* (listing statutes).

However, the dilemma—and the possibility of a mandatory removal order—*will* arise for defendants charged under the many state marijuana distribution offenses that encompass both § 841(b)(4) conduct and certain other § 841 conduct. These are state offenses that encompass distribution of "small amounts" of marijuana for which the issue of remuneration is irrelevant, *see* n.8, *supra* (listing statutes), as well as state offenses that encompass non-remunerative distribution of marijuana for which the issue of drug quantity is irrelevant, *see* n.9, *supra* (listing statutes), or for which both "small" and larger quantities of marijuana are cov-

ered.[11] The list would also include state offenses that provide for non-remuneration as a mitigating factor allowing for a lower sentence—similar to the structure of § 841(b)(4)—but encompass both "small" and larger quantities of marijuana.[12]

Thus, under the Fifth Circuit's approach, immigrants convicted for low-level distribution offenses in certain states will face mandatory deportation, while those convicted for identical conduct in other states or in federal court will not. The difference in outcome will be based solely on the charging jurisdiction. Congress could not have intended such an unfair and capricious regime.[13]

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[11] N.C. Gen. Stat. § 90-95(b)(2), (h)(1)(a) (non-remunerative distribution of 5 grams to 10 pounds of marijuana); Minn. Stat. §§ 152.027(4)(a), 152.01(16) (non-remunerative distribution of "small amount" of marijuana, defined as less than 42.5 grams).

[12] S.C. Code Ann. § 44-53-370(a) (non-remuneration is an affirmative defense allowing for a lower sentence under S.C. Code Ann. § 44-53-460; quantity not specified); Va. Code Ann. § 18.2-248.1(a) (distribution of between one-half ounce and five pounds of marijuana; non-remuneration is an affirmative defense that may lower the offense level).

[13] To the extent that differences among state statutes could lead to different outcomes, the burden should be on the *government* to establish, based on the record of conviction, that anything more than the minimum punishable conduct occurred. The government is better equipped than the immigrant to make the necessary showing. *See* Part II, *supra*; 21B Wright & Graham, *Federal Practice and Procedure* § 5122 (2d ed. 2005) (noting that one traditional consideration in allocating the burden of proof is "whether one party has superior access to the evidence needed to prove the fact"). That result is also consistent with the categorical approach described by this Court, *see Johnson* v. *United States*, 130 S. Ct. 1265, 1269 (2010), which governs the application of the Immigra-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RACHEL E. BARKOW
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 992-8829

WAYNE L. STONER
Counsel of Record
ANNA E. LUMELSKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
wayne.stoner@wilmerhale.com

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tion and Nationality Act to drug offenses, *see Carachuri-Rosendo*, 130 S. Ct. at 2586-2587.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT.

**On Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR HUMAN RIGHTS FIRST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
GSchaerr@winston.com

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

Counsel for *Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
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QUESTION PRESENTED

Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana for no remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Human Rights First[1]—an organization dedicated to the rights of refugees and asylum seekers—respectfully submits this brief to alert the Court to the impact its decision may have on individuals fleeing persecution and on this Nation's compliance with its international treaty obligations.

Many years ago, when it acceded to the 1967 U.N. Protocol Relating to the Status of Refugees (the "Protocol"), the United States agreed that it would not deny protection to a refugee based on criminal conduct in the United States unless the refugee was convicted of a "particularly serious crime" and "constitutes a danger to the community." In the years since then, this Nation has reaffirmed its commitment to the Protocol's principles, codifying its provisions in the U.S. Code.

The Fifth Circuit's interpretation of the Immigration and Nationality Act (the "INA") would lead inevitably to a violation of the Protocol. According to the Fifth Circuit, a state conviction for possession of drugs with intent to distribute is presumptively an "aggravated felony," even though the offense does not require proof of intent to sell and encompasses possession of a small amount of marijuana to share socially with a friend, without remuneration—conduct that would constitute a

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than Human Rights First and its counsel has made a monetary contribution to the preparation or filing of this brief.

misdemeanor under federal law. Such a conviction would thus provide the basis for the refugee's removal from the United States, unless he affirmatively proves to an immigration judge that the facts of his particular offense correspond to a federal misdemeanor.

Adopting this approach would place the United States in violation of the obligations it assumed under the Protocol. The Immigration & Nationality Act treats aggravated felonies—whether "deemed" or actual—as "particularly serious crimes" *per se*, and the Board of Immigration Appeals has found conviction of such a crime to be an automatic bar to asylum. Conviction of an "aggravated felony" for drug trafficking—which the Fifth Circuit found the statute in this case to be—also operates as a presumptive bar to "withholding of removal"—the form of protection granted to a refugee if there is a clear probability that his life or freedom would be at risk if he returned to his home country. The Board has held that the "particularly serious crime" bar applies based on the fact of conviction alone, without any separate analysis of whether the alien in fact "constitutes a danger to the community." Under the Fifth Circuit's interpretation of the INA, then, a refugee under these circumstances *must* be denied asylum and would presumptively be denied withholding of removal, even though he has never been convicted of anything approaching a "particularly serious crime" and is not a "danger to the community."

This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of its international treaty obligations, unless the language of the statute

unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Even if the Fifth Circuit's reading of the relevant statutes here were permissible under their plain language (and it is not), the inevitable conflict with this Nation's treaty obligations should compel rejecting such an interpretation.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. Through advocacy and action, Human Rights First works to encourage the U.S. government and private companies to respect human rights and the rule of law. It strives to create the political environment and policy solutions necessary to ensure consistent respect for human rights, both domestically and internationally.

Since 1978, Human Rights First has worked to protect the rights of refugees, including the right to seek and enjoy asylum. It advocates for adherence to the Protocol and the 1951 Convention Relating to the Status of Refugees (the "Convention"). Further, as the operator of one of the largest pro bono asylum representation programs in the country, Human Rights first also has a longstanding research and advocacy interest in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

Human Rights First has a substantial interest in the issue now before the Court and is well-situated to assist the Court in understanding how the Court's interpretation of the term "aggravated felony" will

affect individuals fleeing persecution, as well as how it will affect this Nation's compliance with its international treaty obligations concerning refugees.

STATEMENT

Petitioner Adrian Moncrieffe was a legal permanent resident of the United States, having immigrated from Jamaica. He was pulled over for a traffic infraction and found to be in possession of 1.3 grams of marijuana—roughly half the weight of a penny. The state authorities charged him under a Georgia statute making it illegal to possess marijuana with the intent to distribute. This statute is quite broad, encompassing everything from the possession of very small amounts of marijuana to share socially (without remuneration) to the purchase and sale of larger amounts for profit. Mr. Moncrieffe entered a guilty plea, receiving five years of probation and the possibility of having the charges expunged from his record if he completed probation successfully.

Two years after his plea agreement, Mr. Moncrieffe was detained by the United States and placed in removal proceedings. Because the Georgia conviction was under a statute that encompassed all types of distribution offenses (both felonies and misdemeanors), the United States took the position that it constituted a conviction of an "aggravated felony" for purposes of federal immigration law and mandated Mr. Moncrieffe's removal. An immigration judge and the Board of Immigration Appeals accepted the Government's position, agreeing that the conviction must be analogized to a federal distribution felony and thus must be deemed an

"aggravated felony." Mr. Moncrieffe was then deported.

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B).[2]

Although the INA does not define "illicit trafficking," Section 924(c)(2) of Title 18 defines "drug trafficking crime," a subcategory of illicit trafficking, as "any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." 18 U.S.C. § 924(c)(2) (internal citations omitted).

In general, "trafficking" means "some sort of commercial dealing." *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006) (citing BLACK'S LAW DICTIONARY 1534 (8th ed. 2004)). Accordingly, in the Controlled Substances Act, Congress has distinguished marijuana distribution felonies from marijuana distribution misdemeanors based specifically on the amount of marijuana involved and whether remuneration is received.[3] Within this statutory paradigm, Congress

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

[3] See 21 U.S.C. § 841(b)(1)(A)(vii) (sentence of at least 10 years for possession with the intent to distribute 1,000 or more

has concluded that "distributing a small amount of marihuana for no remuneration" is only a misdemeanor offense, punishable by a prison term of less than one year. 21 U.S.C. § 841(b)(4).

In the decision under review, however, the Fifth Circuit held that the INA's statutory provisions, taken together, require that "the default punishment for any [state law conviction for] possession of marijuana with [the] intent to distribute is equivalent to a felony under the [Controlled Substances Act]." *Moncrieffe* v. *Holder*, 662 F.3d 387, 392 (5th Cir. 2011). According to the Fifth Circuit, if the state statute encompasses conduct that would be punishable as a misdemeanor as well as a felony, "the defendant bears the burden of producing mitigating evidence in order to qualify for misdemeanor treatment." *Id.*

SUMMARY OF ARGUMENT

The decision in this case will have important implications for refugees fleeing persecution, as well as for this Nation's compliance with its international treaty obligations. In addition to barring an alien from being considered for cancellation of removal—the form of relief relevant to Petitioner here—a conviction for an "aggravated felony" also operates as an absolute bar to asylum. See 8 U.S.C. § 1158(b)(2)(B)(i). Moreover, an applicant for refugee

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kilograms of marijuana); *id.* § 841(b)(1)(B)(vii) (sentence of between 5 and 40 years for possession with the intent to distribute 100 kilograms or more); *id.* § 841(b)(1)(D) (sentence of no more than 5 years for possession with the intent to distribute less than 50 kilograms); *id.* § 841(b)(4) (sentence of no more than one year for "distributing a small amount of marihuana for no remuneration").

protection who has been convicted of an "aggravated felony" that involved "unlawful trafficking in controlled substances" is held by the Attorney General to be *presumptively* ineligible for "withholding of removal"—the relief granted to a refugee whose life or freedom would be threatened if he were returned to his country of nationality. 8 U.S.C. § 1231(b)(3). Conviction of such an offense will also result in termination of asylum (and may result in termination of withholding of removal) for refugees to whom those forms of protection were previously granted. 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.24. For that reason, the statutory terms at issue must be interpreted in light of the context in which they were adopted—as part of Congress's effort to codify this Nation's obligations under the U.N. Protocol Relating to the Status of Refugees.

When it acceded to the Protocol, the United States committed itself to providing certain substantive protections to refugees. Chief among these is the protection against "*refoulement*" to persecution—that is, the commitment by the signatory state that it will not return a refugee to a place where his life or freedom would be threatened. Although the country of refuge may deny protection against *refoulement* based on criminal convictions, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION RELATING TO THE STATUS OF REFUGEES, art. 33(2), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (incorporated by reference and reproduction by the Protocol) (the "Convention"). Congress has generally equated an "aggravated felony" with a "particularly serious crime" for

purposes of interpreting the INA. See 8 U.S.C. § 1101(a)(43); see 8 U.S.C. § 1158(b)(2)(B)(i).

The Fifth Circuit's unjustifiably broad reading of the term "aggravated felony" would lead to the return of refugees to persecution, even if they have never been convicted of a "particularly serious crime" and do not constitute a "danger" to their new community. Under the Fifth Circuit's decision, if a state legislature decides to use a single statute to criminalize *both* the sharing of a small amount of marijuana with a friend *and* the purchase or sale of large amounts of marijuana for profit, any conviction under that statute would be presumed to operate as a categorical bar for a refugee seeking asylum. An immigration judge would have no discretion whatever to grant asylum in such a case, regardless of how great the risk of persecution the refugee faces in his home country, or how long ago the offense occurred. Further, the conviction would also create a presumption that the refugee would be ineligible for withholding of removal—the mandatory form of protection through which the United States implements its non-*refoulement* obligation under the Convention and Protocol.

To adopt the Fifth Circuit's reading of the relevant statutes would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. As this Court has recognized, a statute should not be construed in a manner that would put the United States in violation of its international treaty obligations unless the statutory language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that these statutory

terms are susceptible to more than one interpretation, the *Charming Betsy* doctrine provides an additional reason to adopt a reading that limits "conviction of" an "aggravated felony" to its plain meaning—and to eschew expansion of these common terms to encompass a conviction for something that Congress itself does not regard as a particularly serious offense.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes reflect that commitment.

The statutory provisions in this case must be understood in the context in which they were adopted—as part of Congress's effort to implement this Nation's decades-old obligations under the Protocol Relating to the Status of Refugees. The discussion below outlines that context and how it should inform the question of statutory interpretation now before the Court.

1. The United States acceded to the Protocol more than 40 years ago. This included a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an

international refugee protection regime to ensure the protection of those who flee persecution.[4]

Article 33 of the Convention is specifically incorporated into the Protocol. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). It states.

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

CONVENTION, art. 33(1).

This is commonly known as the protection of "non-*refoulement*." "As the Secretary of State correctly explained when the Protocol was under consideration: 'foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure

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[4] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session (14 August to 25 August 1950), *available at* http://www.unhcr.org.

refugees the widest possible exercise of [their] fundamental rights and freedoms").

2. Congress enacted the Refugee Act for the primary purpose of bringing the United States into conformance with the requirements of the Protocol and Convention. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to [its] shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

As part of this same effort, Congress amended the INA to add a provision governing applications for asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and his eligibility for asylum if he can prove that he has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A). If the refugee makes this showing, the Attorney General has the power to grant asylum. See 8 U.S.C. § 1158 (b)(1) (asylum is discretionary).

Congress codified the Nation's non-*refoulement* obligation by providing that the Attorney General cannot return any alien to a country if he concludes that the alien's life or freedom would be threatened there because of persecution. *Stevic*, 467 U.S. at 410-11 (noting that the U.S. can meet its obligations under the Protocol either by providing asylum or by withholding removal for an alien who meets the definition of a refugee); see 8 U.S.C. § 1231(b)(3)(A).

This form of relief is known as "withholding of removal."

Eligibility for withholding of removal on this basis requires demonstrating a "clear probability" that the alien's life or freedom would be threatened upon his return to his home country. *Stevic*, 467 U.S. at 424; see also 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[5] Once the individual makes this showing, the Attorney General *must* grant withholding of removal, he has no further discretion in the matter. 8 U.S.C. § 1231 (b)(3); *Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.

3. In seeking protection in the United States, refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief.

For example, a person granted asylum can work without an employment authorization document and can obtain an unrestricted social security card.[6] He may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And he may apply to adjust his status to that of legal permanent resident one year after receiving asylum, putting him on the path to U.S. citizenship. See *id.* § 209.2(a). In addition, as recommended by the Final

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[5] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 233, 234 (3d ed. 2007); *Stevic*, 467 U.S. at 428.

[6] See U.S. Citizenship & Immigration Servs., Types of Asylum Decisions, *available at* http://www.uscis.gov.

Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for his spouse and minor children. 8 U.S.C. § 1158(b)(3).[7]

Withholding of removal, on the other hand, does not necessarily protect a refugee from being deported. Instead, it simply protects him from being deported to the particular country or countries where he would face persecution. Moreover, a refugee who is granted withholding but not asylum would not be entitled to bring his spouse and children to safety in the United States or to any of the other benefits of asylum described above.

4. The Convention does not require a host country to provide protection to a refugee if doing so would put its own citizens in danger. Accordingly, Article 33 provides that a host country may deny protection from *refoulement* to individuals who present a danger to their new communities. The second paragraph of Article 33 provides:

> The benefit of [Article 33] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a *particularly serious crime, constitutes a danger to the community of that country.*

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[7] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

CONVENTION, art. 33(2) (emphasis added).

Congress has ratified language that tracks this exception. The statutory provisions authorizing both asylum and withholding of removal provide an exception for any individual who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) (asylum and withholding of removal are unavailable when "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community"). Thus, a refugee convicted of a "particularly serious crime" while in the United States is automatically ineligible for a grant of asylum or withholding of removal, even if he has a well-founded fear of persecution and has shown a clear probability that his life or freedom will be threatened upon his return to his country of origin. Such a conviction is also grounds for termination of asylum and of "withholding of removal" for a refugee to whom such protection was previously granted. 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.24(b)(3).

In general, Congress has equated an "aggravated felony" with a "particularly serious crime." See 8 U.S.C. § 1101(a)(43); see 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA to include a variety of grave offenses, including murder, rape, sexual abuse of a minor, running a prostitution business, and counterfeiting. 8 U.S.C. § 1101(a)(43). Also in this category is "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)." *Id.* at § 1101(a)(43)(B).

In some circumstances—where the refugee received a total sentence of less than five years—the Attorney General has discretion to conclude that an "aggravated felony" is *not* a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). In a decision entitled *Matter of Y-L-*, however, the Attorney General has made clear that "aggravated felonies" with a sentence of less than five years that "involv[ed] unlawful trafficking in controlled substances *presumptively* constitute particularly serious crimes." *Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002) (emphasis added). According to the Attorney General, this presumption can be rebutted only in unusual circumstances that are both "extraordinary and compelling." *Id.* Facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. *Id.* at 277.

5. Because of the connection between the statutory definitions of the terms "aggravated felony" and "drug trafficking crime" and the statutory bars to asylum and withholding of removal, the Court's decision interpreting these terms will have profound implications for the rights of refugees who face a well-founded fear or clear probability of persecution if they are returned to their home countries.

II. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with its international treaty obligations unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[8]

Petitioner's opening brief explains in detail why a "conviction" for an "aggravated felony" cannot include a state law conviction under a statute encompassing conduct that would be a misdemeanor under federal law—namely, the possession of a small amount of marijuana to share socially, without remuneration. To the extent that the term is susceptible to an

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[8] *Weinberger*, 456 U.S. at 29-30, 32-33 (interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (determining statutory construction of Jones Act); accord *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

expanded meaning, however—and the Fifth Circuit apparently believes it is—*Charming Betsy* dictates that these statutory terms be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, to include a state conviction that does not require proof of intent to sell illegal drugs in the term "aggravated felony" would put the United States in violation of its treaty obligations relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it does not otherwise regard as "serious."

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international human rights law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The "particularly serious crime" provision of Article 33(2) creates only a very limited exception to the fundamental right to non-*refoulement*.[9] See

[9] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that

James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

Congress could not have intended the term "aggravated felony" to encompass a state offense proscribing, *inter alia*, the possession of a small amount of marijuana without any intent to sell it. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." CONVENTION art. 33(2). The Board of Immigration Appeals has interpreted the statutory scheme that Congress enacted to implement that exception to begin and end with whether the person committed a "particularly serious crime," without requiring any separate determination of "dangerousness." See, *e.g.*, *Matter of C.*, 20 I&N Dec. 529 (BIA 1992) (rejecting two-step inquiry that would include a separate assessment of dangerousness). Courts of appeals have deferred to the Board's interpretation, albeit at times with reluctance. *N-A-M* v. *Holder*, 587 F.3d 1052, 1057 (10th Cir. 2009) (upholding BIA's rule based on Tenth Circuit precedent while noting "strong arguments that the BIA is not accurately interpreting the statute or its treaty-based

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there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*; see Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141, 155.

underpinnings"). These precedents assume that Congress limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily make a person a "danger to the community."

Congress's use of the term "serious" in other, related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the Criminal Code's main penalty provision involve, among others, commercial trafficking, participation in a continuing criminal enterprise, or importing or exporting a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Congress penalizes those who commit a "serious drug offense" with a sentence of at least *ten years to life*. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" with a maximum sentence of 10 years or more). By contrast, Congress provided a maximum sentence of *no more than one year* for the offense of possessing a small amount of marijuana to share socially, for no remuneration. See 21 U.S.C. § 841(b)(4) (referencing the one year maximum penalty provision provided for in 21 U.S.C. § 844). Thus, under Congress's own statutory scheme, social sharing of marijuana is not a "serious" offense.

By definition, the term "particularly serious crime" cannot include an offense that Congress itself does not otherwise regard as "serious." And if the statutory exception to the non-*refoulement* obligation is understood not to require a separate determination

of "dangerousness," see *N-A-M*, 587 F.3d at 1057, extending the "aggravated felony" definition to offenses like the one at issue in this case creates a conflict with the treaty obligations of the United States that Congress presumptively did not intend. For both of these reasons, to interpret the definition of "aggravated felony" to encompass the social sharing of a small amount of marijuana would put the United States in conflict with the Protocol, based upon Congress's own standards for the relative seriousness of crimes.

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious crime," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[10] Those materials demonstrate that possession of a small amount of marijuana to

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[10] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The United States is a member of the UNHCR's Executive Committee. United States courts have sought guidance from the UNHCR when interpreting both the Protocol and the Convention. See *Castillo-Arias* v. *U.S. Att'y. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed* v. *Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

share socially could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community."

This Court has recognized that the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION, art. 1(F)(b) (emphasis added).[11] As the Handbook explains, "a 'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK

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[11] The history of these provisions confirms their relationship. The discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "*particularly* serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶ 149 at 130 (Erika Feller, *et al.* eds., 2003) ("A common sense reading of Article 33(2) in light of Article 1(F)(b) requires that it be construed so as to address circumstances not covered by Article 1(F)(b)."); accord *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[12] This document also discusses the exceptions in Article 33(2). The Guidelines emphasize that the second exception in Article 33(2) applies only to individuals who commit "particularly grave crimes." GUIDELINES ¶ 16. Further, they explain that "Article 33(2) concerns the future risk that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." An

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[12] United States courts have looked to the Guidelines when interpreting the Protocol and the Convention. See *supra* note 10 and accompanying text.

offense that Congress has explicitly treated as a misdemeanor could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that sharing a small quantity of marijuana for no remuneration is not a "particularly serious crime."

Treaties relating to drug trafficking further show that the social sharing of marijuana cannot be deemed a "particularly serious" crime. The United States is party to a number of treaties concerning narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "TRAFFICKING CONVENTION"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 18 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7) and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94.

Article 3.1 of the Trafficking Convention requires signatory nations to criminalize offenses that involve actual distribution of drugs as "serious criminal offenses." See TRAFFICKING CONVENTION, *supra*, art. 3(a)(1). Under the Trafficking Convention, then, widespread commercial drug distribution is categorized as a "serious" offense, as opposed to a "particularly serious" offense.

Indeed, the Trafficking Convention sets out a long list of factors to be considered before a drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra*, art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.*

If even the commercial distribution of narcotics is not "particularly serious" without facts such as these, then surely the possession of a small amount of marijuana to share for no remuneration cannot be deemed "particularly serious."

III. The Fifth Circuit's approach would effectively permit a State to dictate the Nation's compliance or non-compliance with the Protocol's non-*refoulement* provision.

Immigration policy is a quintessential federal issue. As this Court very recently observed, it "shapes the destiny of the Nation." *Arizona* v. *United States*, 567 U. S. --, -- S.Ct. -- (2012) (slip op. at 24). For that reason, "it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Lopez*, 549 U.S. at 59.

That is particularly so in this context, where the statutory definitions implicate the Nation's compliance with international treaty obligations. U.S. treaty obligations are guarantees that the Federal Government makes on behalf of the entire Nation. The Constitution does not permit a State to enter into a treaty on its own. U.S. CONST. art. I, § 10. For the same reason, a State should not be able dictate, in any particular instance, whether the Nation will do what its international treaty obligations call for it to do.

Under the Fifth Circuit's reasoning, however, the Nation's compliance with the Protocol could depend on the legislative choices of an individual State. Here, the Georgia legislature decided to use a single statute to criminalize both the social sharing of small amounts of marijuana as well as the commercial sale of large amounts. Nevertheless, the Fifth Circuit is willing to presume that every conviction under this statute is a conviction for an aggravated felony. This, in effect, would allow a state legislature to "overrule" Congress's judgment and authorize a refugee's removal even when his offense would have been punished as only a misdemeanor under federal law. As this Court recently observed, "[a] decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice." *Arizona*, 567 U.S. at -- (slip op. at 18). Congress, not an individual state's legislature, is that "one voice." Accordingly, decisions about which offenses subject an alien to removal proceedings must be made by Congress, especially when they implicate this Nation's international treaty obligations. See *id.*

To be sure, the Fifth Circuit would allow a refugee to present evidence that his offense was, in fact, only a federal misdemeanor. But that is an entirely unsatisfactory way to ensure the Nation's compliance with the Protocol. As the Petitioner's brief explains, proving the circumstances of a particular drug offense after the fact is no small task. The immigration proceedings may take place years after the conviction, when evidence is gone and witnesses are unavailable. The state record of conviction may be of no help. And if the refugee has nothing but his own testimony and credibility to make his case, he may be left without any effective appellate review. For all these reasons, the Fifth Circuit's willingness to allow a refugee to try to rebut the presumption does not change the fact that its reasoning would often lead the United States to breach its obligations under the Protocol—returning a refugee to persecution even when no state or federal court ever convicted him of a "particularly serious crime."

Nor would the Fifth Circuit's approach leave any other effective way to ensure the United States' compliance with the Protocol. While one convicted of a "particularly serious crime" does remain eligible to apply for *deferral* of removal, under the regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), this is insufficient to ensure the protection required by the Protocol. See 8 C.F.R. § 208.17(a). To be eligible for deferral of removal, an alien must establish that upon returning to his country of nationality it is "more likely than not" that he would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will

not protect refugees who would face even a clear probability of persecution in their home countries, if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement. Furthermore, deferral of removal does not provide the same level of protection as asylum or *withholding* of removal. For example, deferral of removal does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination with fewer procedural protections. *Id.* § 208.17(b)(i)-(iv).

This lesser form of protection will not ensure adherence to the Protocol's non-*refoulement* provision that prohibits removing someone to a state "where his life or freedom would be threatened" on account of his membership in a protected class. See CONVENTION, art. 33(1). Thus, if the Fifth Circuit's reasoning is endorsed, the possibility of relief under the Convention Against Torture will not prevent the United States from breaching its international treaty obligations to refugees under the Convention and the Protocol.

CONCLUSION

In light of the implications of the issue for refugees and its impact on the Nation's compliance with its international treaty obligations and implementing statutes, Human Rights First urges this Court to reverse the decision of the Fifth Circuit and conclude that the term "aggravated felony" under the immigration laws cannot include a conviction under a state statute that encompasses the possession of a small amount of marijuana for sharing socially, without remuneration.

Respectfully submitted.

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
GSchaerr@winston.com

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

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v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALINA DAS
Counsel of Record
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6467
alina.das@nyu.edu

Counsel for Amici Curiae

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Law Library

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Other Authorities

Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011).....*passim*

Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. -- (forthcoming 2012), *available at* http://ssrn.com/abstract= 2046839 ..... 13, 28

Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. OF RACE & L. -- (forthcoming 2012) , *available at* http://papers.ssrn.com /sol3/papers.cfm?abstract_id=2062952 29

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STATEMENT OF INTEREST

Amici curiae are 83 professors of law who specialize in immigration law, including its intersection with administrative and criminal law. *Amici* have an interest in this Court's consideration of the historical development and proper application of the "categorical approach," which has served as a bedrock principle of immigration adjudications involving criminal convictions for over a century. *Amici* submit this brief to provide the Court with the history and principles behind the categorical approach in the immigration context and to illustrate how Respondent's position leads to the harms that the categorical approach is designed to avoid. The names, titles, and institutional affiliations (for identification purposes only) of *amici* are listed in an Appendix.[1]

SUMMARY OF ARGUMENT

For over a century—well before this Court issued its decisions in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) (applying a categorical approach to analyze prior convictions for federal criminal sentence enhancement purposes)—immigration adjudicators have applied a categorical approach to

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[1] Pursuant to Rule 37, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

determine whether a person has been "convicted" of an offense triggering immigration consequences. This approach, grounded in Congress's requirement that noncitizens be "convicted" of certain types of offenses to face specified grounds of removal or bars to relief, has been affirmed by case after case and repeatedly reenacted by Congress since it first specified a conviction requirement in the statute in 1875. This approach requires immigration adjudicators to determine the immigration consequences of a conviction based solely on the minimum conduct that is necessarily established by the conviction under the applicable criminal statute, not the underlying facts.

Respondent's position is at fundamental odds with this long-established approach in immigration cases. Under Respondent's position, noncitizens convicted under criminal statutes that require no more than the social sharing of a small quantity of marijuana would be labeled "drug trafficking" aggravated felons. The consequences of this label are severe; as a bar to discretionary relief from removal, it deprives immigration adjudicators of the power to consider favorable equities, humanitarian concerns, and the public interest. Respondent's position, if adopted, has the potential to subsume low-level marijuana offenses across the country, nearly all of which explicitly lack a direct commercial or trafficking basis.

This brief is organized in two parts. Part I describes the century of jurisprudence affirming Congress's choice of a categorical approach for the assessment of convictions by immigration adjudicators. It explains the critical role that this approach plays in ensuring uniformity, predictability, and fairness in the assessment of convictions in the

immigration context. Part II illustrates how Respondent's approach turns the categorical approach on its head, with the result that minor non-trafficking marijuana offenses are labeled as drug trafficking aggravated felonies, depriving noncitizens of eligibility for relief from removal.

ARGUMENT

I. RESPONDENT'S POSITION CONFLICTS WITH THE CATEGORICAL APPROACH, AS APPLIED BY COURTS AND AGENCY OFFICIALS IN IMMIGRATION CASES FOR OVER A CENTURY.

Courts and the agency have long applied a categorical approach in determining whether a criminal disposition leads to immigration consequences that are based on "conviction" of an offense. Under the categorical approach, immigration adjudicators may consider only the minimum conduct proscribed by the statute of conviction in determining the immigration consequences of the past conviction.

In recent years, this Court has applied a categorical approach in cases arising in both the criminal sentencing and immigration contexts. In *Taylor* and *Shepard*, the Court applied a categorical approach to determine if a prior conviction triggered federal sentencing enhancements. Similarly, the Court has applied a categorical approach in a number of immigration cases predicated on past convictions. *See Carachuri-Rosendo v. Holder*, __ U.S. __, 130 S. Ct. 2577 (2010) (applying categorical approach to determine if second drug possession conviction

qualified as aggravated felony); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) (applying categorical approach to determine if theft conviction qualified as theft aggravated felony); *see also Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

These recent cases reinforce the applicability of the categorical approach in this case. However, the categorical approach in the immigration context did not begin with these cases. Nor were its rationales imported from or confined to the criminal sentencing context. Rather, as illustrated by a century of precedent, the categorical approach emerged independently to address Congress's statutory scheme and its compelling concerns unique to the administrative immigration context.

Rather than address the long-settled origins of the categorical approach in immigration law, Respondent proffers a new version of the approach that turns it on its head. *See infra* Part II (analyzing Respondent's position in depth). Instead of looking to the minimum conduct proscribed by the statute in marijuana cases, Respondent seeks to have immigration adjudicators assume the maximum conduct that could be punished in these cases, even in the absence of such findings by the criminal court. *See* BIO 10-11, 13; *see also Moncrieffe v. Holder*, 662 F.3d 387, 392 (5th Cir. 2011). Respondent attempts to cure the fundamental unfairness in its position by permitting immigration adjudicators to make factual findings beyond the record of conviction. *See Matter of Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012) (placing the burden on a noncitizen to prove he or she was not convicted of an aggravated felony "by any probative evidence, including evidence outside of the

record of conviction"). This approach—presuming a conviction to be equivalent to a conviction of the maximum conduct that the statute could conceivably cover and requiring a mini-trial on the underlying facts to counteract the obvious unfairness thus created—goes against the core principles behind the categorical approach in the immigration context.

This section of the brief outlines the principles behind the categorical approach and describes their proper application in the immigration context. Part I.A describes the century of jurisprudence requiring a categorical approach to determine the minimum conduct proscribed by a criminal conviction in the immigration context. Part I.B describes the underlying rationales that have long informed the categorical approach. Part I.C clarifies the consistent application of the categorical approach in contexts involving different burdens of proof.

A. The categorical approach has long required courts and agency officials to assess the minimum conduct proscribed under a criminal statute in order to determine whether an individual was necessarily "convicted" of a given offense.

The categorical approach has been applied in the immigration context for over a century. It is relied upon by front-line immigration officers and immigration judges every day to decide thousands of claims regarding conviction-based grounds of removability and bars to status or relief from removal. Congress, aware of the streamlined administrative nature of these adjudications, has

repeatedly required that immigration officials and courts rely only on what is established by the conviction itself, i.e., the minimum conduct established by the criminal court's adjudication of the case based on the criminal statute. This test is well-established in case law interpreting Congress's conviction requirement, which Congress has repeatedly utilized when adding certain grounds of removal and bars to status or relief in federal immigration law. *See United States v. Hayes*, 555 U.S. 415, 424-25 (2009) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (citation omitted); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

From the beginning, Congress has premised specific immigration consequences on *convictions*. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding "persons who are undergoing a sentence for conviction in their own country of felonious crimes"); Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084 (excluding "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"). Congress chose language requiring a conviction to trigger some immigration consequences, while prescribing a conduct-based standard for others. *Compare id. with* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 ("[A]ny alien woman or girl . . . *practicing* prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported").

In examining Congress's use of the "convicted" language in early federal immigration cases, courts concluded that Congress intended to limit the authority of immigration adjudicators to determine consequences based on the conviction rather than the underlying conduct. One of the first cases discussing this requirement is *United States ex rel. Mylius v. Uhl*, in which a noncitizen challenged his detention and exclusion from the United States on the basis of a prior conviction for criminal libel in England. 203 F. 152, 153 (S.D.N.Y. 1913). Immigration officials had concluded that the petitioner had been "convicted" of an offense "involving moral turpitude" by reviewing reports of the trial and the underlying facts that gave rise to his conviction. *Id.* Judge Noyes, writing for the federal district court in the Southern District of New York, concluded that the immigration officials erred by not confining their review to the "inherent nature" of the statutory offense of criminal libel, which "depends upon what *must be shown* to establish [the noncitizen's] guilt." *Id.* at 154 (emphasis added). Under this inquiry, the court held that libel did not necessarily involve moral turpitude, for libel convictions could be obtained where defendants violated the statute without intent or knowledge. *Id.* The Second Circuit affirmed, holding that Congress did not intend for immigration officers to "act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude. . . . this question must be determined from the judgment of conviction." *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

This reading of the statute was further reinforced by Judge Learned Hand in a series of cases. In *United States ex rel. Guarino v. Uhl*, Judge Hand addressed the issue of whether a conviction for possession of a "jimmy," a common burglary tool, with intent to commit a crime was properly classified as a crime involving moral turpitude. 107 F.2d 399, 400 (2d Cir. 1939). Judge Hand focused the inquiry upon "whether all crimes which [the petitioner] may intend are 'necessarily,' or 'inherently,' immoral." *Id.* Judge Hand observed that the statute of conviction covered conduct that could be "no more than a youthful prank" born of "curiosity, or a love of mischief." *Id.* Focused upon this minimum level of conduct, Judge Hand stated that "it would be to the last degree pedantic to hold that [the conviction] involved moral turpitude and to visit upon it the dreadful penalty of banishment." *Id.* While acknowledging that "other circumstances [made] it highly unlikely that this alien had possession of the jimmy for [a] relatively innocent purpose," Judge Hand nevertheless honored the minimum conduct test, holding that "[deportation] officials may not consider the particular conduct for which the alien has been convicted, and indeed this is a necessary corollary of the doctrine itself." *Id.* As Judge Hand noted in another case, the doctrine cut both ways because "[neither] the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. Conversely, when it does, no evidence is competent that he was in fact blameless." *United States ex rel.*

Robinson v. Day, 51 F.2d 1022, 1022-23 (2d Cir. 1931).

The categorical approach was also applied in cases in which a noncitizen had been convicted under a so-called "divisible" statute—one with separately enumerated offenses, only some of which necessarily trigger specific immigration consequences. In such cases, courts permitted immigration adjudicators to examine the official record of conviction—not as an inquiry into the facts underlying the conviction, but rather for the limited purpose of determining which branch of the statute served as the basis for the noncitizen's conviction. This test—which courts later termed a "modified categorical approach"—was applied in the seminal case *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *Id.* Finding that the state offense defined second degree assault through five subdivisions, only some of which inherently involved moral turpitude, the court held that immigration officials could look to "the charge (indictment), plea, verdict, and sentence" to determine "the specific criminal charge of which the alien is found guilty and for which he is sentenced." *Id.* at 759. The court further held that the inquiry was limited solely to this "record of conviction," permitting immigration adjudicators to determine only which subsection gave rise to the noncitizen's conviction. *Id.* at 757. The court reaffirmed the minimum conduct test, holding that "[t]he evidence upon which the verdict was rendered may not be considered." *Id.* at 759.

The reasoning of these early federal court decisions was also adopted by the Attorney General and the Board of Immigration Appeals ("B.I.A.") soon after its formation. *See Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (A.G. 1933) (applying a categorical approach to convictions); *see also Matter of S--*, 2 I. & N. Dec. 353 (B.I.A., A.G. 1945) (same). In doing so, both the Attorney General and the B.I.A. have looked to the minimum conduct necessary under a conviction to determine deportation or exclusion consequences. *See, e.g., Matter of B--*, 4 I. & N. Dec. 493, 496 (B.I.A. 1951) ("[T]he definition of the crime must be taken at its minimum . . . in a situation where the statute includes crimes which involve moral turpitude as well as crimes which do not inasmuch as an administrative body must follow definite standards, apply general rules, and refrain from going behind the record of conviction."); *Matter of P--*, 3 I. & N. Dec. 56, 59 (B.I.A. 1948) ("[A] crime must by its very nature and at its minimum, as defined by the statute, involve an evil intent before a finding of moral turpitude would be justified.").

The categorical approach has remained the dominant inquiry in immigration cases, whether the provision relates to conviction of a crime involving moral turpitude or to conviction of a more recently added provision, such as the aggravated felony ground that was added to the immigration statute in 1988. *See, e.g., Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at its minimum, taking into account the minimum criminal conduct necessary to sustain a conviction under the statute.") (internal quotation and citation omitted); *Joseph v. Att'y Gen.*, 465 F.3d 123, 128 (3d Cir. 2006) (stating that "only

the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant" to whether that conviction qualifies as an aggravated felony) (internal quotation and citation omitted); *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (employing the categorical approach to evaluate whether conviction qualified as an aggravated felony, stating that "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.") (internal quotation and citation omitted); *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 902-03 (B.I.A. 1999) (employing the categorical approach to aggravated felony ground, stating that "[i]t is longstanding Board practice to construe a respondent's offense according to the minimum conduct necessary to sustain a conviction . . . [I]t is not what the respondent did, but the crime of which he was convicted, determined by the record of conviction, that is dispositive.");[2] *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011)

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[2] The Attorney General recently departed in part from the categorical approach for crimes involving moral turpitude in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008). A majority of federal circuits have rejected *Silva-Trevino* as contrary to Congressional intent requiring a categorical approach. *See Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); *but see Bobadilla v. Holder*, No. 11-1590, --- F.3d ---, 2012 WL 1914068 (8th Cir. May 29, 2012); *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010).

(describing the historical development and recent application of the categorical approach in immigration law and collecting cases).

B. As its long history demonstrates, the categorical approach is an essential rule in ensuring the fair, predictable, and uniform administration of immigration law.

By strictly limiting the analysis to the minimum conduct required to sustain the conviction, the categorical approach avoids what would be a fraught inquiry into the underlying facts of each individual conviction. As courts and the agency have long noted, immigration adjudicators act in an administrative capacity and are ill-equipped to conduct mini-trials into the facts underlying a past criminal conviction. *See, e.g.*, *Mylius*, 210 F. at 863; *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335-36 (B.I.A. 1996) (holding that a factual inquiry into the conduct underlying a conviction "is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence" and that "the harm to the system induced by the consideration of such extrinsic evidence far outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability"). The categorical approach prohibits such an inquiry, and directs immigration adjudicators to rely on the criminal court adjudication.

By doing so, the categorical approach helps ensure the predictable, uniform, and just

administration of federal immigration law. These principles have influenced the development of the categorical approach in the immigration context and continue to underscore its importance today. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. -- (forthcoming 2012) (manuscript at 39-44), *available at* http://ssrn.com/abstract=2046839 (analyzing rationales for the categorical approach in the immigration context)); Das, *supra*, at 1725-46 (same); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) (same).

Several of these rationales have an important constitutional dimension. In light of *Padilla v. Kentucky*, for example, the categorical approach plays a critical role in ensuring that defense attorneys meet their Sixth Amendment obligations to advise noncitizens defendants about the immigration consequences of criminal convictions. *See id.*, __ U.S. __, 130 S.Ct. 1473, 1477 (2010); *see also* Das, *supra*, 1743-45 (discussing the role of the categorical approach in ensuring compliance with *Padilla*); Koh, *supra*, at 43 (same). As this Court held in *Padilla*, "deportation . . . is intimately related to the criminal process." 130 S.Ct. at 1481; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). By pegging immigration consequences to the conviction rather than the underlying conduct, the categorical approach enables

defense counsel to advise noncitizen defendants about the consequences of a given plea and gives defendants notice of those consequences. *See Padilla*, 130 S.Ct. at 1477; *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1111 (9th Cir. 2011) (departing from categorical approach "would make a mockery of the affirmative obligation that criminal defense attorneys have to advise their non-citizen clients of the potential immigration consequences of accepting a plea bargain"); *Jean-Louis*, 582 F.3d at 482 (finding that categorical approach's minimum conduct test "has provided predictability, enabling aliens better to understand the immigration consequences of a particular conviction.").

By contrast, probing the facts underlying these convictions undermines settled expectations and threatens noncitizens with severe, unanticipated consequences. Whether such nonessential facts appear in the criminal record is often completely haphazard, and reliance upon those facts would place noncitizens convicted of the same offense on an unequal footing solely based on the luck of the available factual narrative, with little notice of such consequences. *See* Sharpless, *supra*, at 1031 ("Immigration judges who later rely on [nonessential] facts to determine the nature of the conviction deprive noncitizens of notice regarding the immigration consequences of convictions."). Even if applied prospectively, such an approach would require defense counsel to anticipate and explain a wide array of deportation risks arising from nonessential facts that might serve as the basis for a later immigration adjudication, dramatically changing the calculus for plea agreements. *See* Das, *supra*, at 1742-44. Immigrant defendants may

increasingly elect to go to trial, and thereby place additional pressures upon overburdened criminal courts. *See id.* at 1745. Moreover, trials themselves may also expand in complexity, as noncitizen defendants are forced to contest ancillary factual findings that, while irrelevant to a determination of guilt, may prove critical in immigration court.[3] *See id.* The categorical approach prevents these unintended consequences and ensures that only the findings necessarily adjudicated by the criminal tribunal become the basis for that conviction's immigration consequences.

The categorical approach also ensures uniformity in immigration adjudications, another rationale with constitutional underpinnings. *See* U.S. Const. Art. I, § 8, cl. 4 ("Congress shall have Power To . . . establish a *uniform* Rule of Naturalization") (emphasis added); *see, e.g.*, *Bustamante-Barrera v. Gonzalez*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization law"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3rd Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution"). From the earliest cases, courts and the agency have recognized that the uniform application of immigration law demands that the assessment of

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[3] Moreover, it may be impossible for a noncitizen to contest nonessential facts alleged in a criminal prosecution. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 962 (9th Cir. 2011) (Berzon, J., concurring) (observing that even "'overwhelming evidence' to dispute an alleged non-elemental fact" may be of little help to a criminal defendant because presentation of such evidence "would have been a waste of time and probably excluded as irrelevant") (citations omitted).

prior convictions be consistent for noncitizens *vis-à-vis* other noncitizens convicted of the same offense. *See, e.g.*, *Mylius*, 210 F. at 863 ("It would be manifestly unjust . . . to exclude one person and admit another where both were convicted of [the same offense], because, in the opinion of the immigration officials, the testimony of the former case showed a more aggravated offense than in the latter."); *Matter of R--*, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954) ("The [categorical] rule set forth . . . prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment; and makes for uniform administration of law"). Inquiry into the underlying facts of each conviction is incompatible with uniform assessment. Such an inquiry purports to bring additional information to bear on the case, but instead introduces nonessential facts. The fortuity of whether such facts may appear in the record varies across substantively identical cases, such that noncitizens convicted under the same statute may receive dramatically different treatment under this approach. *See* Sharpless, *supra*, at 1032. Moreover, given the varied adversarial and nonadversarial contexts in which conviction-based consequences arise in the immigration system, the categorical approach play a particularly critical role in ensuring the uniform application of law. *See* Das, *supra*, at 1734-37 (discussing how conviction assessments are made by immigration judges and front-line immigration officers alike).

Based on these principles and other norms, courts and the agency have long applied the

categorical approach in the immigration context. These rationales continue to inform the important role that the categorical approach plays in the immigration adjudicative system today.

C. Throughout its history, the application of the categorical approach has not varied based on burdens of proof.

These rationales also help explain why the application of the categorical approach does not vary based on the burden of proof. While the party carrying the burden of proof varies across contexts in immigration law, *compare* 8 U.S.C. § 1229a(c)(3)(A) (government bears burden to prove basis for deportability), *with* 8 U.S.C. § 1229a(c)(2)(A) (noncitizen bears burden to prove admissibility) *and* 8 U.S.C. § 1229a(c)(4)(A) (noncitizen bears burden to prove eligibility for cancellation from removal), application of the categorical approach is a legal, rather than factual, inquiry. While it sometimes calls for reference to the record of conviction, this is solely for the purpose of determining which portion of the statute gave rise to the noncitizen's conviction. The outcome therefore does not turn on burdens of proof; either the conviction is for an offense that is an aggravated felony or it is not. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) ("Although an alien must show that he has not been convicted of an aggravated felony, he can do so merely by showing that he has not been *convicted* of such a crime. And . . . under the categorical approach, a showing that the minimum conduct for which he was convicted was not an aggravated felony suffices to do this.").

Indeed, in contexts where the noncitizen bears the burden of proof, courts have long applied the strict categorical approach. For example, the Second Circuit's landmark opinion in *Mylius* arose out of a noncitizen's challenge to his exclusion from the United States—a context in which the noncitizen generally bears the burden of proof. *Mylius*, 210 F. at 863. The federal immigration agency has adopted this same stance in subsequent exclusion cases, irrespective of the placement of the burden on the noncitizen. *See, e.g.*, *Attorney General Op.*, 37 Op. Att'y Gen. 293, 294-95 (1933); *Matter of T--*, 2 I. & N. Dec. 22, 22 (B.I.A. 1944); *Matter of P--*, 3 I. & N. Dec. 56 (B.I.A. 1947).

Moreover, the consistent application of the categorical approach regardless of burden preserves the norms of predictability and uniformity discussed above, *supra* Part I.B. Deportation proceedings follow a two-step process. The first step—in which the government bears the burden, *see* 8 U.S.C. § 1229a(c)(3)(A)—is to determine deportability. The second step—in which the noncitizen bears the burden, *see* 8 U.S.C. § 1229a(c)(4)(A)—is to determine whether he or she is eligible for, and merits, discretionary relief from deportation. In the context of lawful permanent residents with drug convictions, the government can establish a ground of deportability under either 8 U.S.C. § 1227(a)(2)(B)(i) ("convicted of" controlled substance offense) or 8 U.S.C. § 1227(a)(2)(A)(iii) ("convicted of" aggravated felony). The latter ground is also a bar to eligibility for discretionary relief. *See* 8 U.S.C. § 1229b(a)(3) (to be eligible for cancellation, noncitizen must "not [have] been convicted of any aggravated felon").

If the categorical approach were cast aside, and the outcome of an inquiry into what a noncitizen was "convicted of" varied depending on whose responsibility it was to carry the burden of proof, *see* Part II.B (explaining Respondent's view), the government could simply charge the noncitizen with a controlled substance offense at the deportability stage and aver that the noncitizen has to disprove the aggravated felony at the relief stage. This departure from the established analysis thus would impose a "layer of arbitrariness" to immigration proceedings, for a noncitizen's relief eligibility would "hang[] on the fortuity of an individual official's decision" to charge or not to charge an aggravated felony at the removal stage. *See Judulang v. Holder*, __ U.S. __, 132 S.Ct. 476, 486 (2011).

Congress's continued choice to predicate various immigration consequences on whether a noncitizen has been "convicted" of an aggravated felony in both the removal and relief eligibility context—regardless of burden—demonstrates the continued applicability of the categorical approach in both contexts. *See Fajardo v. Att'y Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011). ("Had there been congressional disagreement with the courts' interpretation of the word 'conviction,' Congress could easily have removed the term 'convicted' from . . . the INA during any one of the *forty times* the statute has been amended since 1952.") (citing 8 U.S.C. § 1182 (historical notes)) (emphasis added); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (B.I.A. 2008) ("[W]e must presume that Congress was familiar with [the history of the categorical approach] when it made [a new ground of removal] depend on a 'conviction.'"); *see also supra* Part I.A.

II. RESPONDENT'S POSITION TURNS THE CATEGORICAL APPROACH ON ITS HEAD AND RESULTS IN THE VERY HARMS THAT THE CATEGORICAL APPROACH IS DESIGNED TO AVOID IN THE IMMIGRATION CONTEXT.

Under federal immigration law, noncitizens who have been "convicted" of an aggravated felony are subject to deportability and bars to relief from removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1229b(a)(3). This category includes convictions for "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" ("CSA"). A prior state conviction is a drug trafficking aggravated felony if the state offense "is punishable as a federal felony." *Lopez*, 549 U.S. at 60. The CSA punishes marijuana distribution offenses as either a felony or a misdemeanor. The lowest level federal felony covers the distribution of "less than 50 kilograms of marihuana . . . except as provided in paragraph [] 4." 21 U.S.C. § 841(b)(1)(D). Paragraph 4 states that those "distributing a small amount of marihuana for no remuneration *shall* be treated as provided" in 18 U.S.C. § 844, the misdemeanor simple possession provision of the CSA. 21 U.S.C. § 841(b)(1)(D) (emphasis added). A hard line is therefore drawn in the CSA itself between felony and misdemeanor distribution of marijuana delineated by the quantity of marijuana involved and the presence or absence of remuneration.

Nonetheless, under Respondent's approach, *all* state marijuana distribution offenses, including those that may involve the federal misdemeanor equivalent of distribution of "a small amount of marihuana for no remuneration," are presumptively drug trafficking aggravated felonies. *See Moncrieffe*, 662 F.3d at 392 (requiring immigration adjudicators to assume the maximum conduct that could be punished in these cases, "[e]ven if . . . [the conviction] could cover conduct that would be considered a misdemeanor" under 21 U.S.C. § 841(b)(4)). To cure the due process problems posed by such an approach, Respondent would permit immigration adjudicators to make factual findings beyond the record of conviction, and place the burden of disproving the aggravated felony on the noncitizen. *See Castro-Rodriguez*, 25 I. & N. at 702.

This part illustrates the flaws inherent in Respondent's position through the use of case examples. Part II.A explains how Respondent's analysis of low-level marijuana distribution convictions expands the drug trafficking aggravated felony label beyond its intended limits. Part II.B explains how Respondent's insistence upon factual mini-trials imposes new and unsustainable burdens upon both noncitizens and the immigration system. Part II.C explains how Respondent's approach strips immigration adjudicators of congressionally authorized discretion and requires mandatory deportation for minor convictions.

A. Under Respondent's position, minor non-trafficking marijuana offenses are deemed "drug trafficking aggravated felonies."

Respondent arrives at a position that treats minor non-trafficking marijuana offenses as "drug trafficking aggravated felonies" by importing a rigid "elements" analysis that arose in the *Apprendi* criminal sentencing enhancement context and is poorly suited to immigration law. In criminal sentencing enhancement cases, "elements" constitute findings that must be proven to a jury in order to convict for a given offense. *Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (1989). According to Respondent, a prior state conviction is properly classified as an aggravated felony where the elements of the state offense appear to match the elements of the CSA felony offense—even where the state offense also proscribes conduct that by definition falls within the requirements of the CSA misdemeanor. BIO 7.

Respondent forces this analysis upon the immigration context. Relying upon cases holding that federal prosecutors need only prove the knowing distribution of, or possession with intent to distribute, a quantity of marijuana to secure a felony conviction in federal court, Respondent argues that all offenses that may conceivably cover these *Apprendi* elements constitute drug trafficking aggravated felonies. BIO 7; *see also Moncrieffe*, 662 F.3d at 392. Reasoning that neither remuneration nor a small amount of marijuana is an *Apprendi* element of the federal criminal offense, Respondent dismisses the misdemeanor provision in section

841(b)(4) as a "mitigating exception" that "is irrelevant in using a 'categorical approach' to identify CSA felonies." *See* BIO 9; *Moncrieffe*, 662 F.3d at 392 (treating felony sentencing as the "default," and finding misdemeanor provision to be non-elemental exception). As a result, all marijuana distribution convictions, irrespective of whether or not they involved the transfer of a small amount for no remuneration, constitute drug trafficking aggravated felonies.

This *Apprendi*-style approach runs counter to the longstanding application of the categorical approach and has already been rejected by the Court in *Carachuri-Rosendo*. *See* 130 S. Ct. at 2582 n.3, 2583 (applying the categorical approach to determine whether a state offense meets the requirements of a federal recidivist possession felony under the CSA, irrespective of whether recidivism is defined as a sentencing factor rather than an element). The relevant question under the categorical approach in the immigration context is whether the state conviction, at its minimum, requires the findings necessary to establish the relevant conviction-based immigration penalty in federal law. *See supra* Point I.A. In the instant case, a state conviction qualifies as a drug trafficking aggravated felony only if it "proscribes conduct punishable as a felony" under the CSA. *See Lopez*, 549 U.S. at 60; 8 U.S.C. § 1101(a)(43)(B). Congress explicitly drew a felony-misdemeanor line in the CSA wherein the distribution of a small amount of marijuana for no remuneration "shall be treated" as a misdemeanor. 21 U.S.C. § 841(b)(4). Thus, under the categorical approach, a state offense that proscribes conduct that may involve the distribution of a small amount of

marijuana for no remuneration (i.e., the federal misdemeanor category) cannot categorically be deemed an aggravated felony. *Cf. Carachuri-Rosendo*, 130 S. Ct. at 2582 n.3, 2583 (holding that where the state offense involved no adjudication of recidivism in criminal court, offense may not be deemed an aggravated felony). Nevertheless, Respondent ignores the misdemeanor provisions of the CSA and presumes that a noncitizen's prior conduct is the *maximum*—always punishable as a federal felony—even though numerous state offenses may involve the mere social sharing of marijuana and are punished as misdemeanor or lesser offenses. *See, e.g.*, Alaska Stat. § 11.71.050(a)(1); D.C. Code § 48-094.01(a)(2)(B); Haw. Rev. Stat. Ann. § 712-1248(1)(d); 720 Ill. Comp. Stat. Ann. 550/5(a)-(b); Ind. Code Ann. § 35-49-4-10(a); Ky. Rev. Stat. Ann. § 218A.1421(2)(a); Me. Rev. Stat. Ann. tit. 17-A, § 1106(1-A)(D); Mich. Comp. Laws Ann. § 333.7410(7); N.Y. Penal Law § 221.40; 35 Pa. Stat. Ann. § 780-113(a)(1); S.D. Codified Laws § 22-42-7; Tenn. Code Ann. § 39-17-418; Va. Code Ann. § 18.2-248.1.

The results in this situation are predictably problematic—noncitizens convicted of minor non-trafficking marijuana convictions are transformed into drug trafficking aggravated felons. **Tam Duy Pham** was admitted to the United States as a refugee from Vietnam in 1998 at the age of fourteen, becoming a lawful permanent resident in 2001. Pham Immigration Judge ("IJ") Decision at 1 (on file with *amici*). On September 15, 2004, Mr. Pham pled guilty to conspiracy to commit misdemeanor "sale, *gift*, distribution or possession with intent to sell, *give* or distribute" less than one-half ounce of marijuana. *Id.* at 2 (quoting Va. Code Ann. § 18.2-248.1) (emphasis

added). He received a twelve-month suspended sentence and was placed on probation. *Id.* at 1. DHS initiated removal proceedings in 2010, charging him with a drug trafficking aggravated felony. *Id.*

Despite the low-level nature of the offense, which explicitly covers the nonremunerative gift of less than a half ounce of marijuana, the Immigration Judge and the Board of Immigration Appeals both sustained the aggravated felony charge, and the BIA erroneously held that it was Mr. Pham "who must prove the additional facts (*i.e.*, the absence of remuneration)." *Id.* at 2. In a cursory opinion, the Fourth Circuit affirmed, and Mr. Pham was removed to Vietnam shortly thereafter. *See Pham v. Holder*, 442 Fed.Appx 62 (4th Cir. 2011).

Benedicto Rendon, an LPR born in Mexico, was convicted in 1997 of Kan. Stat. Ann. § 65-4163(a), possession with intent to sell marijuana. *Rendon v. Mukasey*, 520 F.3d 967, 970-71 (9th Cir. 2008). DHS initiated removal proceedings in 2005, charging Mr. Rendon with a controlled substance violation. *Id.* at 971. Both the BIA and the Ninth Circuit concluded that Mr. Rendon's 1997 conviction was a drug trafficking aggravated felony that barred access to cancellation, asylum, and withholding of removal relief. *Id.* at 975. Commercial trafficking was read into Mr. Rendon's 1997 conviction because the record of conviction contained the words "intent to *sell*." *Id.* However, this analysis was contrary to the minimum conduct analysis because "sales" in Kansas law includes "barter, exchange or gift." *Kansas v. Donaldson*, 279 Kan. 694, 715 (2005) (quoting *Kansas v. Griffith*, 221 Kan. 83, 84 (1976)). Mr. Rendon's conviction therefore covered possession with intent to share marijuana without remuneration.

B. Under Respondent's position, agency officials and immigration courts must engage in mini-trials of the alleged facts behind a conviction.

Taken to the extreme, Respondent's position provides no opportunity or notice for the noncitizen to be heard on the very factors (remuneration and quantity) presumed to turn his or her state marijuana conviction into a drug trafficking aggravated felony. For this reason, Respondent has attempted to cure this due process problem by permitting immigration adjudicators to make these determinations in the first instance. *See* BIO 13-14 (citing *Castro-Rodriguez* and conceding that a noncitizen can "defeat an aggravated-felony finding" if he or she can "prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration."). Extrapolating from federal criminal court holdings that have placed the burden upon the criminal defendant to prove the applicability of the misdemeanor provision in 21 U.S.C. § 841(b)(4), Respondent argues that the same burden falls upon noncitizens in immigration proceedings, who would be forced to prove affirmatively that their state conviction involved no remuneration and a small amount of marijuana. *See* BIO 11, 13; *Moncrieffe*, 662 F.3d at 392 ("Even if [Petitioner's conviction] could cover conduct that would be considered a misdemeanor under § 841(b)(4), [Petitioner] bore the burden to prove that he was convicted of only misdemeanor conduct.").

Respondent's position and its importation of criminal law burden-shifting into the immigration

context are untenable. In a federal prosecution for marijuana distribution, defendants are provided with: (1) notice that they are facing possible conviction of a drug trafficking crime—i.e. distribution of a non-small amount of marijuana and/or transfer for remuneration; and (2) an explicit opportunity to contest any felony-level allegations and establish the nonremunerative transfer of a small amount of marijuana. However, in the vast majority of state prosecutions, noncitizens charged with marijuana distribution will have neither notice that they face conviction for a drug trafficking crime, nor an opportunity to contest trafficking allegations during the original criminal proceedings, where findings on quantity or remuneration are not necessary for conviction or sentencing. *See supra* Part I.B.

Contrary to Respondent's arguments, the B.I.A.'s analysis in *Castro-Rodriguez* does not solve these due process problems. BIO 14. *Castro-Rodriguez* held that a state marijuana distribution conviction, "because its elements correspond to the elements of the Federal felony," presumptively qualifies as a drug trafficking aggravated felony. 25 I. & N. at 701. *Castro-Rodriguez* then held that it was the noncitizen's burden to prove the application of section 841(b)(4) and went a step further—requiring a "circumstance-specific" inquiry beyond the bounds of the record of conviction. *Id.* at 702. The BIA authorized inquiry into "any probative evidence, including evidence outside the record of conviction such as police and laboratory reports." *Id.*

The application of such a test compels the mini-trials and disuniformity that courts, the agency, and Congress have long sought to avoid in the

immigration context. *See* Part I.B. First, such mini-trials will necessarily require extensive and complex inquiry into the factual circumstances of prior convictions that could be years or even decades old. To prevail under Respondent's approach and "prove" that a prior conviction involved only the transfer of a small amount of marijuana for no remuneration, noncitizens will be forced to contest old allegations, many of which were wholly inconsequential to the original criminal proceedings. Noncitizens will be forced to track down far-flung lab and police reports that were never part of the original criminal proceedings or the record of conviction. They will need to present competing expert witnesses to challenge old evidence. Noncitizens will also need to subpoena witnesses from the original criminal case such as law enforcement officers, an exceedingly difficult proposition given the traditional reluctance and limited authority of immigration adjudicators to compel witnesses to appear. *See* Das, *supra*, at 1728. These new requirements complicate immigration proceedings and create delays, all while forcing immigration adjudicators to confront issues outside of their expertise. *See id.* at 1728, 1738-41; Koh, *supra*, at 39-40 (noting extraordinarily high caseloads of immigration adjudicators and additional strains that would be imposed by mini-trials).

These difficulties are compounded by the fact that noncitizens convicted of controlled substance offenses are often subjected by the Department of Homeland Security to mandatory detention without the possibility of bond. 8 U.S.C. § 1226(c)(1)(B). The vast majority of these noncitizens will go through their immigration proceedings without legal representation. *See, e.g.*, Mark Noferi, *Cascading*

Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. OF RACE & L. -- (forthcoming 2012) (manuscript at 26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =2 062952 (noting that 84% of detained noncitizens were unrepresented in 2010).

As shown by the case examples below, mini-trials will necessarily involve extensive and complex factual inquiry that both immigration adjudicators and noncitizens are poorly equipped to handle. **Vladimir Perez Santana**, a longtime LPR from the Dominican Republic, was convicted in 2010 of possession of marijuana with intent to distribute under Massachusetts law, which requires no findings on quantity or remuneration.[4] *Matter of Perez Santana*, 2012 WL 1705634 *1 (B.I.A. 2012). During Mr. Perez Santana's removal proceedings, the Immigration Judge applied Respondent's approach, disregarding the clear minimum conduct and undertaking a factual inquiry into the conduct underlying Mr. Perez Santana's conviction. *Id.* at *2. Specifically, the Immigration Judge relied upon otherwise unsubstantiated claims made in a state police report,[5] which alleged that "the marijuana in

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[4] *See Massachusetts v. Keefner*, 461 Mass. 507, 514-515 (2012) (holding that state prosecution under Mass. Gen. Laws Ann. ch. 94C § 32C(a) "is not limited solely to situations where the 'distribut[ion]' involves a sale").

[5] Courts and immigration adjudicators have long held police reports to be unreliable for purposes of the categorical approach. *See Shepard*, 544 U.S. at 20-23 (barring sentencing court from considering police report and complaint application, which extended "beyond conclusive records made or used in adjudicating guilt"); *Matter of Teixeira*, 21 I. & N. 316, 320

[Mr. Perez Santana's] possession was wrapped in separate bags." *Id.* at *1. On the basis of this ancillary fact, which was of no consequence to Mr. Perez Santana's innocence or guilt under the state statute and which he had no reason to contest during the criminal proceedings, the Immigration Judge ruled that he was guilty of a drug trafficking aggravated felony. *Id.*

The *Castro-Rodriguez* decision itself raises doubts regarding the practical application of its approach—in particular how noncitizens can sufficiently meet their burden to prove the application of the "mitigating exception." **Wilmer Rodrigo Castro-Rodriguez**, an LPR from Bolivia, was convicted in 2010 of misdemeanor possession with intent to give or distribute less than one-half ounce of marijuana under Virginia law.[6] 25 I. & N. at 698-99. He was sentenced to twelve months of imprisonment, with eleven months suspended. *Id.* at 699. Placed in removal proceedings, Mr. Castro-Rodriguez demonstrated to the satisfaction of the Immigration Judge—who credited Mr. Castro-Rodriguez's testimony regarding the factual circumstances of his conviction—that he intended to distribute a small amount of marijuana for no remuneration. *Id.* at 704.

Despite Mr. Castro-Rodriguez's credited testimony and the clear factual findings made by the

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(B.I.A. 1996) ("The arrest report typically will not tell us what charges the prosecution chose to pursue, nor which of those charges actually resulted in a 'conviction.'").

[6] *See* Va. Code Ann. § 18.2-248.1(a)(1) (covering offenses that include the nonremunerative "gift" of up to one-half ounce of marijuana).

Immigration Judge, the BIA reversed and remanded for "additional fact-finding." *Id.* at 704. Apparently unconvinced by Mr. Castro-Rodriguez's testimony, the BIA provided little guidance demonstrating how noncitizens would purportedly meet their burden before an immigration adjudicator.

Even where noncitizens successfully "prove" their way out of a drug trafficking aggravated felony finding, the inevitable delays impose severe hardships, and the outcome may be based on the fortuity of legal representation or other factors not available to all noncitizens. **J-D-** arrived from Haiti as a lawful permanent resident in 1994 at the age of one. J. Dollar Letter (on file with *amici*). As a high school sophomore in 2009, J-D- pled *nolo contendere* to possession of marijuana with intent to sell or deliver under Florida law, when he was arrested for attempting to give, for no remuneration, 1.1 grams of marijuana to a friend.[7] *Id.* J-D- turned his life around after this incident and went on to graduate from high school, earning a college scholarship.

Despite the fact that, on its face, J-D-'s conviction was for an offense that neither specifies the quantity of marijuana nor requires the presence of remuneration, and represented precisely the gratuitous sharing penalized as a federal misdemeanor, the Immigration Judge applied the approach offered by Respondent, and held that it was J-D-'s burden to establish the applicability of the federal misdemeanor exception. *Id.* Through

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[7] Fla. Stat. Ann. § 893.13(1)(a) (requiring no specific quantity of marijuana or findings of remuneration for conviction); *Florida v. Mena*, 471 So.2d 1297, 1299 (Fla. 3d DCA 1985) (noting that sale and delivery were distinct).

counsel—and an additional *five months* of proceedings during which J-D- remained detained—J-D- was able to obtain and produce his original arrest report, his plea colloquy from the conviction, as well as a government crime laboratory report that explicitly detailed the quantity of marijuana involved. *Id.* The Immigration Judge concluded that he was eligible for relief and eventually granted cancellation of removal in light of his significant equities. However, due to the extension of his hearings and his continued detention, he was unable to enroll in college by the date required. The scholarship offer expired and J-D- is now unable to attend. *Id.* The proceedings on his eligibility for relief bore little resemblance to the streamlined inquiry that the categorical approach was meant to ensure.

C. Under Respondent's position, noncitizens that would otherwise merit relief from removal are mandatorily deported.

As noted above, *see supra* Part I.C, an aggravated felony finding forecloses an immigration adjudicator from considering relief from removal, even where the individual's positive equities, evidence of rehabilitation, and humanitarian, family unity or non-refoulment interests would merit favorable discretion. *See, e.g.*, 8 U.S.C. §§ 1158(b)(2)(B)(i) (barring asylum without regard to persecution risk if convicted of an aggravated felony); 1229b(a)(3) (barring cancellation of removal without regard to the noncitizen's positive equities and rehabilitation if convicted of an aggravated felony).

Respondent's position, requiring a drug trafficking aggravated felony finding even for minor nonremunerative transfers of marijuana, strips immigration judges of a critical discretionary tool and results in the mandatory deportation of noncitizens for whom relief would serve compelling humanitarian and public interest purposes.

J.S.M. is a longtime LPR from Mexico who first arrived in the U.S. at the age of seven. IJ Decision at 3 (on file with *amici*). Both of J.S.M's parent's are LPRs, and he has ten United States citizen or LPR siblings that reside in the United States. *Id.* J.S.M. married his U.S. citizen wife Judy in 1999, and is the sole father figure to two U.S. citizen step-sons, ages twenty-one and eighteen, as well as his U.S. citizen biological son, who is twelve. *Id.* at 4.

In 1997, J.S.M. pled guilty to the unlawful manufacture, delivery, or possession with intent to manufacture or deliver marijuana under Washington law, which requires no finding of quantity or remuneration, and was sentenced to four months of jail and work release.[8] *Id.* at 14. The record of conviction, including the plea agreement, stemming from this offense stated only that J.S.M. "unlawfully delivered marijuana to another person" and made no mention of quantity or remuneration.

Detained and placed in removal proceedings in 2010, the Immigration Judge adopted the position Respondent has presented here, and found J.S.M.'s

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[8] Wash. Rev. Code § 69.50.401(a) (requiring no minimum quantity of marijuana and no findings of remuneration); *see Washington v. McGinley*, 18 P.2d 30, 33 (Wash. Ct. App. 1977) ("deliver" understood to be "a broader category than sale").

1997 conviction to be a drug trafficking aggravated felony that barred him from consideration for cancellation relief. *Id.* at 15. However, the Immigration Judge stated explicitly that J.S.M. "merited a favorable exercise of discretion *had he been eligible*" because he "has been a good provider for his family and has been a good father to his children as well as a loving husband. He has spent significant time with his children doing activities such as fishing, camping, and going to movies. He has taught his children to love and care for each other. He and his wife are best friends. [He] helps his mother financially and talks to her every day. In addition, [his] father suffers from serious health problems as a result of a stroke." *Id.* at 19-20 (emphasis added). The BIA affirmed the Immigration Judge's aggravated felony finding, and J.S.M.'s case is now pending before the Ninth Circuit, where he continues to seek the opportunity to apply for cancellation.

A drug trafficking aggravated felony finding also bars access to asylum for noncitizens whose freedom, health, and even lives are jeopardized in their country of origin. **Belito Garcia** and his family fled persecution and civil war in his birthplace of Angola, making their way through refugee camps before arriving in the United States as lawful permanent residents in 1982. *Garcia v. Att'y Gen.*, No. 05-2786 (3d Cir.), Petitioner's Brief at 12. Mr. Garcia made a life here—both of his parents naturalized and he married a U.S. citizen with whom he had a U.S. citizen son. *Id.* In 1996, Mr. Garcia pled *nolo contendere* to two counts of possession with intent to distribute marijuana under Pennsylvania law, and was sentenced to a total of one year of

probation. [9] *Id.*, Respondent's Brief at 5. This conviction, which requires no findings of quantity or remuneration, was deemed an aggravated felony based on underlying *factual* allegations made in a police officer's criminal complaint, none of which were substantiated in the record of conviction or present in any plea colloquy or plea agreement before the courts. *Garcia v. Att'y Gen.*, 462 F.3d 287, 289, 290, 293-94 (3d Cir. 2006). As a result, Mr. Garcia's application for asylum was pretermitted despite the persecution he likely faces in Angola. *Id.*

In contrast, Immigration Judges that apply the proper categorical approach have been able to exercise discretion in deciding to grant relief to noncitizens. **P.M.** came to the United States from Haiti in 1971 as an LPR at the age of three and has a large U.S. citizen family. IJ Decision at 3 (on file with *amici*). Twenty-five years ago, in 1986, P.M. was convicted twice for misdemeanor sale of marijuana under New York law.[10] P.M. was placed in removal proceedings in 2011 and was charged with being a drug trafficking aggravated felon. *Id.* at 2. Applying a categorical approach, the Immigration Judge went forward with relief. *Id.* at 10. Finding that P.M.'s

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[9] 35 Pa. Stat. Ann. § 780-113(a)(30) (covering, at minimum, possession with intent to distribute a small amount of marijuana for no remuneration).

[10] N.Y. Penal Law § 221.40 (covering, at minimum, the nonremunerative transfer of a small amount of marijuana); *Martinez*, 551 F.3d at 119 (holding that section 221.40 convictions were categorically not aggravated felonies because the minimum conduct is "precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor").

convictions "[did] not outweigh the many positive factors in his case, such as his extremely long residence, strong family ties, and the serious hardship he will face if deported to Haiti," the Immigration Judge held that P.M. "deserve[d] a second chance to remain in the U.S." and granted cancellation. Had Respondent's approach been applied, the Immigration Judge would have been stripped of her authority to grant cancellation of removal unless P.M. was able to prove that his twenty-five-year old misdemeanor convictions did not involve remuneration.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reject Respondent's position and reaffirm the application of the longstanding categorical approach to the provision in this case.

Respectfully submitted,

ALINA DAS
Counsel of Record
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan Street, 5th Floor
New York, NY 10012
(212) 998-6467
alina.das@nyu.edu

Counsel for Amici Curiae

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APPENDIX

LIST OF *AMICI CURIAE*

Please note that the signatories listed herein appear on their own behalf. Institutional affiliations are listed for identification purposes only.

Muneer I. Ahmad, Clinical Professor of Law, Yale Law School

Deborah Anker, Clinical Professor of Law and Director, Harvard Immigration and Refugee Clinical Program, Harvard Law School

Lenni Benson, Professor of Law, New York Law School

Richard A. Boswell, Professor of Law & Director, Immigration Clinic, University of California Hastings School of Law

Eleanor Brown, Associate Professor, George Washington University Law School

Kristina M. Campbell, Assistant Professor of Law and Director, Immigration and Human Rights Clinic, University of the District of Columbia David A. Clarke School of Law

Stacy Caplow, Professor of Law and Director of Clinical Education, Brooklyn Law School

Jennifer M. Chacón, Professor of Law, University of California Irvine School of Law

Violeta R. Chapin, Associate Clinical Professor of Law, University of Colorado Law School

Ming Hsu Chen, Associate Professor, University of Colorado Law School

Gabriel J. Chin, Professor of Law, University of California Davis School of Law

Michael J Churgin, Raybourne Thompson Centennial Professor in Law, The University of Texas at Austin

Marisa S. Cianciarulo, Associate Professor of Law and Director, Bette & Wylie Aitken Family Violence Clinic, Chapman University School of Law

Fernando Colon-Navarro, Associate Dean and Professor of Law, Thurgood Marshall School of Law

Evelyn H. Cruz, Clinical Law Professor, Arizona State University Sandra Day O'Connor College of Law

Alina Das, Assistant Professor of Clinical Law, New York University School of Law

Nora V. Demleitner, Dean and Professor of Law, Hofstra University Maurice A. Deane School of Law

Ingrid Eagly, Acting Professor of Law, University of California Los Angeles School of Law

César Cuauhtémoc García Hernández, Assistant Professor, Capital University Law School

Lauren Gilbert, Professor of Law, St. Thomas University School of Law

Jennifer Gordon, Professor of Law, Fordham University School of Law

Joanne Gottesman, Clinical Professor, Rutgers School of Law – Camden

Anjum Gupta, Assistant Professor of Law and Director, Immigrant Rights Clinic, Rutgers School of Law – Newark

Jonathan Hafetz, Associate Professor of Law, Seton Hall University School of Law

Susan Hazeldean, Assistant Clinical Professor of Law, Cornell Law School

Barbara Hines, Clinical Professor of Law, Co-Director, Immigration Clinic, University of Texas School of Law

Geoffrey A. Hoffman, Clinical Associate Professor and Director, Immigration Clinic, University of Houston School of Law

Mary Holper, Associate Professor and Director, Immigration Clinic, Roger Williams University School of Law

Alan Hyde, Distinguished Professor and Sidney Reitman Scholar, Rutgers University School of Law

Kevin R. Johnson, Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California Davis School of Law

Anil Kalhan, Associate Professor of Law, Drexel University Earle Mack School of Law

Daniel Kanstroom, Professor of Law and Director, International Human Rights Program, Boston College Law School

Kathleen Kim, Professor of Law, Loyola Law School of Los Angeles

David Koelsch, Associate Professor, Immigration Law Clinic, University of Detroit Mercy School of Law

Jennifer Lee Koh, Assistant Professor of Law and Director, Immigration Clinic, Western State University College of Law

Hiroko Kusuda, Assistant Clinic Professor, Law Clinic & Center for Social Justice, Loyola New Orleans College of Law

Sylvia R. Lazos, Justice Myron Leavitt Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law

Stephen Lee, Assistant Professor of Law, University of California Irvine School of Law

Anita Ortiz Maddali, Assistant Professor of Law & Director of Clinics, Northern Illinois University College of Law

Peter L. Markowitz, Associate Clinical Professor of Law, Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law

Kenneth A. Mayeaux, Assistant Professor of Professional Practice, Louisiana State University Paul M. Hebert Law Center

Elizabeth McCormick, Associate Clinical Professor of Law and Director, Immigrant Rights Project, University of Tulsa College of Law

M. Isabel Medina, Ferris Family Distinguished Professor of Law, Loyola University New Orleans College of Law

Nancy Morawetz, Professor of Clinical Law, New York University School of Law

Fatma E. Marouf, Associate Professor of Law, Co-Director of the Immigration Clinic, University of Nevada, Las Vegas, William S. Boyd School of Law

Margaret Martin, Clinical Instructor, Center for Social Justice, Seton Hall University School of Law

Vanessa Merton, Professor and Faculty Supervisor, Immigration Justice Clinic, Pace University School of Law

Christina L. Misner-Pollard, Clinical Instructor, Immigration Law Clinic, Oklahoma City University School of Law

Jennifer Moore, Regents Professor of Law, University of New Mexico School of Law

Hiroshi Motomura, Susan Westerberg Prager Professor of Law, University of California Los Angeles School of Law

Karen Musalo, Clinical Professor of Law and Director, Center for Gender & Refugee Studies, University of California Hastings College of the Law

Lori A. Nessel, Professor of Law and Director, Center for Social Justice, Seton Hall University School of Law

Michael A. Olivas, William B. Bates Distinguished Chair in Law, University of Houston Law Center

Michele R. Pistone, Professor of Law and Director, Clinic for Asylum, Refugee and Emigrant Services, Villanova University School of Law

Nina Rabin, Associate Clinical Professor of Law and Director, Bacon Immigration Law and Policy Program, University of Arizona James E. Rogers College of Law

Jenny Roberts, Associate Professor, American University Washington College of Law

Sarah Rogerson, Assistant Clinical Professor of Law and Director, Family Violence Litigation Clinic, Albany Law School

Victor C. Romero, Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, The Pennsylvania State University, Dickinson School of Law

Rachel E. Rosenbloom, Assistant Professor of Law, Northeastern University School of Law

Kevin Ruser, M.S. Hevelone Professor of Law, Director of Clinical Programs, University of Nebraska-Lincoln College of Law

Rachel Settlage, Assistant Professor of Law and Director, Asylum and Immigration Law Clinic, Wayne State Law School

Irene Scharf, Professor of Law, University of Massachusetts School of Law – Dartmouth

Barbara Schwartz, Clinical Professor, University of Iowa College of Law

Rebecca Sharpless, Associate Clinical Professor and Director, Immigration Clinic, University of Miami School of Law

Ragini Shah, Associate Clinical Professor of Law, Suffolk Law School

Dan R. Smulian, Associate Professor of Clinical Law, Safe Harbor Project, Brooklyn Law School

Gemma Solimene, Clinical Associate Professor of Law, Fordham University School of Law

Peter J. Spiro, Charles Weiner Professor of Law, Temple University Beasley School of Law

Maunica Sthanki, Clinical Instructor, Immigration and Human Rights Clinic, University of the District of Columbia David A. Clarke School of Law

Juliet P. Stumpf, Professor of Law, Lewis & Clark Law School

Maureen A. Sweeney, Clinical Instructor, Immigration Clinic, University of Maryland Carey School of Law

Margaret Taylor, Professor of Law, Wake Forest University School of Law

David B. Thronson, Professor of Law, Michigan State University College of Law

Allison Brownell Tirres, Assistant Professor, DePaul University College of Law

Enid Trucios-Haynes, Professor of Law, Brandeis School of Law

Diane Uchimiya, Associate Professor, Director of the Justice and Immigration Clinic, University of La Verne College of Law

Michael S. Vastine, Assistant Professor of Law and Director, Immigration Clinic, St. Thomas University School of Law

Katherine L. Vaughns, Professor of Law, University of Maryland Francis King Carey School of Law

David P. Weber, Associate Professor of Law, Creighton University School of Law

Jonathan Weinberg, Professor of Law, Wayne State University

Michael J. Wishnie, William O. Douglas Clinical Professor of Law and Director, Jerome N. Frank Legal Services Organization, Yale Law School

Lauris Wren, Clinical Professor and Director, Hofstra Law School Asylum Clinic, Hofstra University Maurice A. Deane School of Law

Liliana C. Yanez, Clinical Professor and Supervising Attorney, Immigrant and Refugee Rights Clinic, City University of New York School of Law

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL IMMIGRANT JUSTICE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT IN SUPPORT OF PETITIONER

CLAUDIA VALENZUELA
SARAH ROSE WEINMAN
CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, IL 60601
(312) 660-1613

WILLIAM LYNCH SCHALLER
COUNSEL OF RECORD
ELIZABETH YINGLING
BRANDON MOSEBERRY
ANGELA VIGIL
BAKER & MCKENZIE LLP
300 E. RANDOLPH
CHICAGO, IL 60611
(312) 861-8000
William.Schaller@
bakermckenzie.com

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Counsel for Amici Curiae

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ADMINISTRATIVE APPEALS

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TABLE OF AUTHORITIES CONTINUED

Matter of Fortis, 14 I & N Dec. 576 (BIA 1974)..... 23

Matter of Gutierrez, 16 I. & N. Dec. 226 (BIA 1977) 7

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8 U.S.C. § 1226(c) 5, 19

8 U.S.C. § 1226(c)(1)(B) 5

8 U.S.C. § 1362 6

WEBSITES

2011 Operations Manual ICE Performance-Based National Detention Standards (hereinafter "PBNDS"), 5.6 (Telephone Access) at 4-5, (Dec. 2, 2008), http://www.ice.gov/detention-standards/2011/ 9-12

Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Compliance, at 16, (Jul. 2007), http://www.gao.gov/assets/270/263327.pdf..... 10

American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and*

TABLE OF AUTHORITIES CONTINUED

Professionalism in the Adjudication of Removal Cases, Executive Summary, ES-28 (2010), http://www.abanet.org/media/nosearch/immigration reform_executive_summary_012510.pdf..... 20

Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA, at 30-32 (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf..... 7

Appleseed, *Assembly Line Injustice*, Ch. 8, p. 29, (last visited Jun. 26, 2012), http://www.appleseednetwork.org/Portals/0/Documents/Publications/Chapter%208.pdf..... 8, 20

Capps, Fix, Passel, & Perez-Lopez, *A Profile of the Low-Wage Immigrant Workforce* (last visited Jun. 28, 2012), http://www.urban.org/publications/310880.html..... 7

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Educational Attainment of the Foreign Born in the United States, (July 2004), http://www.migrationinformation.org/feature/display.cfm?ID=234..... 14

Educational Attainment in the United States: 2009, (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf..... 14

Executive Office for Immigration Review, FY 2010 Statistical Year Book, G1, Figure 9 (2011), http://www.justice.gov..... 7, 14

TABLE OF AUTHORITIES CONTINUED

Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement, GAO-06-771*, at 21, (August 2006), http://www.gao.gov/assets/260/251155.pdf 17

Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States*, at 14, 17 (2011), http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf 12

Immig. & Customs Enforcement, "Fact Sheet: Detention Management (November 10, 2011), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm 9

Karen Tumlin, Linton Joaquin, & Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers*, at 41-42, 70, (2009), http://www.nilc.org/document.html?id=9 12

Monroe County Clerk, *Court and Land Records*, http://www.monroecounty.gov/clerk-records.php 15, 16

Nat'l Immigrant Just. Cntr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, at 4-5, 9, (2010), https://www.immigrantjustice.org 10

Superior Court of California, San Mateo County, *Records Management Fees*, http://www.sanmateocourt.org/court_divisions/records_management/fees.php 15, 16

U.S. Dep't of Homeland Security, Office of Immigration, *Statistics, Immigration Enforcement Actions: 2010*, at 4, (2011), at 4, http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf 5

The National Immigrant Justice Center ("NIJC"), Americans for Immigrant Justice ("AI Justice"), Northwest Immigrant Rights Project ("NWIRP"), and the Florence Immigrant and Refugee Rights Project ("FIRRP") respectfully submit this brief as *Amici Curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

Amici NIJC, AI Justice, NWIRP, and FIRRP are immigration-focused organizations with substantial interest in the Court's resolution of this case.

Amicus NIJC is a Chicago-based non-profit organization, accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide representation to individuals in removal proceedings. Through its staff of attorneys and paralegals and a network of over 1,000 *pro bono* attorneys, NIJC provides free or low-cost legal services to immigrants, including detainees. Together with area law school clinics, NIJC conducts and coordinates "Know Your Rights" presentations and individual legal consultations annually for more than 4,000 detainees at six county jails in Illinois, Wisconsin, and Kentucky.

Amicus AI Justice, formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to protecting and promoting the basic human rights of immigrants. Since its founding in 1996, AI Justice

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[1] All parties have consented in writing to the filing of this *Amici Curiae* brief. Counsel for *Amici* are putting them on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

has served the most vulnerable immigrant populations through free direct services, federal court litigation, impact advocacy, and education. AI Justice's detention attorneys regularly visit immigration detention centers in south Florida, provide "Know Your Rights" presentations to detainees, and monitor conditions of facilities (both federal and local) that detain immigrants throughout Florida. AI Justice's attorneys directly represent detained individuals before immigration and appellate courts, including those whose cases are affected by the issues presented here.

Amicus NWIRP is a non-profit legal organization dedicated to the defense and advancement of the legal rights of immigrants in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants in removal proceedings and before the federal courts. NWIRP also provides representation, workshops, and legal advice to low-income immigrants in detention.

Amicus FIRRP provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement ("ICE"). Through its "Know Your Rights" presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies and assists persons who are held in detention while pursuing meritorious claims before an immigration judge, the BIA, and the Ninth Circuit Court of Appeals.

As preeminent organizations in the immigration litigation field, *Amici* share a significant interest in ensuring the immigration consequences of criminal

Convictions are comprehensible, reasonable, predictable, and knowable to immigrant defendants and their counsel. As a result of their work, *Amici* are well-positioned to speak to the nature of immigration court procedures, particularly procedures that affect detainees. To aid the Court's analysis of a question germane to the immigration court system, *Amici* offer specific experiences of our staff and volunteers who live in this system each day observing its mechanics and functions.

SUMMARY OF ARGUMENT

The Court is faced with two choices in evaluating whether a predicate marijuana distribution "conviction" is a felony: (1) the traditional categorical approach applied in immigration cases for almost a century, in which a court need only conduct a legal analysis of the elements of the crime and need not review the specific facts of the individual crime, or (2) the novel non-categorical approach advocated by Respondent here, which requires time-intensive hearings to determine facts relating to an individual's past misconduct – assuming such facts are even available. Based upon their extensive experience at all levels of immigration proceedings, *Amici* urge this Court to maintain the categorical approach. Only the categorical approach is practical and workable; indeed, it is critical to the just and efficient administration of the immigration court system.

The practical hurdles that individuals like Moncrieffe would face if required to gather, produce, and effectively re-litigate the facts underlying a prior

incident are virtually insurmountable. Individuals in Moncrieffe's situation generally are subject to mandatory detention for the entire course of proceedings. Detainees are not appointed counsel, so the vast majority are forced to proceed *pro se*. Detainees have limited ability to place or receive telephone calls and no access to fax, email, or internet. Even the slower postal service option is frustrated by transfers of detainees between and among facilities with no forwarding of mail and often loss of materials. And detainees are commonly held in remote locations, making in-person communications difficult. For detainees with little or no English proficiency and little or no education, these obstacles are all but impossible to overcome.

Respondent's proposed fact-intensive inquiry also would burden an already overloaded immigration court system. Immigration judges facing backlogged dockets are reluctant to continue cases to allow immigrant litigants more time to gather records, despite the high hurdles detainees face in securing needed documents. The system relies on immigration judges to advise *pro se* detainees of potential forms of relief available. Yet, under the novel non-categorical framework, the immigration judge could not adequately advise the *pro se* detainee without an unfair and impractical mini-trial and re-litigation of the underlying facts.

By contrast, the traditional categorical approach is one familiar to immigration judges. It can be applied uniformly, fairly, and with far greater efficiency than Respondent's proposed new system would permit.

The Court should adhere to the categorical approach and rule for the Petitioner.

ARGUMENT

I. INDIVIDUALS LIKE MONCRIEFFE ARE POORLY POSITIONED TO ENGAGE IN FACT DISPUTES REGARDING PRIOR CONVICTIONS.

A. *People removable for controlled substance offenses and most criminal convictions are subject to mandatory detention.*

Federal law mandates the detention of most individuals charged with removability on criminal grounds. *See,* 8 U.S.C. § 1226(c); *see also, Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention during removal proceedings where immigrant conceded removability). Mandatory detention is not limited to felonies or aggravated felonies; individuals charged as controlled substance offenders, including misdemeanor offenders, are subject to mandatory detention as well. 8 U.S.C. § 1226(c)(1)(B).[2]

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[2] The expansion of mandatory detention has led to a massive increase in the number of individuals held in the custody of the ICE branch of the Department of Homeland Security for the duration of their removal proceedings. More than 363,000 immigrants were detained during removal proceedings in 2010. *See* U.S. Dep't of Homeland Security, Office of Immigration, *Statistics, Immigration Enforcement Actions: 2010,* at 4, (2011),

Even when a immigrant has a plausible argument that she does not fit within the categories triggering mandatory detention, BIA precedent forbids release, even on bond, unless the immigrant can convince an immigration judge that the government is "substantially unlikely to prevail" on the removability charge. *Matter of Joseph*, 22 I. & N. Dec. 799, 806-807 (BIA 1999). This often means that the immigrant will remain detained unless and until the immigration judge finds the charges not sustained. *Id.* at 807.

Under the BIA's current test, a detained immigrant like Moncrieffe would need to produce factual evidence in order to prove that her past conduct corresponded to the federal misdemeanor provision codified at 21 U.S.C.§ 841(b)(4). *See, Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008); *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698 (BIA 2012). However, the fact of her detention makes it unlikely that she will be able to obtain factual evidence relating to long-past offenses. Thus the practical and fundamental flaw with Respondent's test presents a classic "Catch 22": a detainee cannot be released unless she produces evidence to support her arguments; but she cannot find evidence to support her arguments unless she is released.

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http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

B. *The vast majority of immigration detainees are unrepresented.*

Individuals detained during removal proceedings have a statutory right to representation "at no expense to the government." 8 U.S.C. § 1362. The BIA has interpreted the statute to mean that the government will not appoint counsel, no matter what the circumstances. *Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-29 (BIA 1977). As a result, most immigrants lack counsel.

Private representation can be costly. Immigrants often are of modest means and thus unable to retain private counsel. *See,* Capps, Fix, Passel, & Perez-Lopez, *A Profile of the Low-Wage Immigrant Workforce* (last visited Jun. 28, 2012), http://www.urban.org/publications/310880.html (reporting that that nearly half of immigrants earn less than 200 percent of the minimum wage). The few free immigration legal service providers, such as *Amici*, can represent only a small percentage of detainees; nearly 85 percent of detainees are not represented by counsel. *See, Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA*, at 30-32 (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

Thus, without the benefit of counsel, 886,000 immigrants faced the prospect of removal in the five-year period ending in 2010. *See, Executive Office for Immigration Review, FY 2010 Statistical Year Book, G1, Figure 9* (2011),

http://www.justice.gov/eoir/statspub/fy10syb.pdf (showing number of unrepresented individuals in immigration court for previous five years).

Without counsel, detainees are unable to locate and present evidence that may be critical to the issue of removability. Unrepresented immigrants often lack an adequate understanding of the legal standards at issue in their cases and are unable to develop an appropriate factual record. *See,* Appleseed, *Assembly Line Injustice*, Ch. 8, p. 29, (last visited Jun. 26, 2012), http://www.appleseednetwork.org/Portals/0/Documents/Publications/Chapter%208.pdf.[3]

C. *Conditions within the immigration detention system prevent adequate self-representation.*

Effective *pro se* representation is nearly impossible for detained individuals. Multiple institutional obstacles hinder detainees from engaging in the factual investigations that would be needed to prevail under Respondent's proposed rule. Communication barriers, remote facilities, and frequent transfers frustrate the efforts of even the most capable detainee to prove her case.

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[3] Appleseed is a nonprofit network of 17 public interest justice centers in the US and Mexico that aims to promote social and economic justice, protect the rights of the under-represented, and resolve injustice through systemic reform. Information about the organizations research and publications can be found at www. appleseednetwork.org.

ICE uses a plethora of facilities to detain immigrants; each of these facilities is run differently, and detainees are transferred frequently between them. ICE currently houses its detainees in more than 250 local, state, and federal facilities. Nearly 67 percent of ICE detainees are housed in local or state facilities, 17 percent in contract detention facilities, 13 percent in ICE-owned facilities (service processing centers), and 3 percent in federal Bureau of Prisons facilities. *Immig. & Customs Enforcement, "Fact Sheet: Detention Management* (November 10, 2011), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm. Each facility has distinct procedures for detainee communications.

These circumstances make communication with the outside world extremely difficult for detainees. Indeed, the only constant is their difficulty in communicating with anyone at all.

1. *Placing a telephone call*

Detainees seeking to gather factual evidence related to a past arrest need to place phone calls to courts, law enforcement agencies, and prior criminal defense counsel. Yet detainees must run a gauntlet to make phone calls. They often are unable to track down the relevant telephone numbers for distant court records departments, police stations, or attorneys. Detainees unable to pay for phone calls are not permitted to call prior defense counsel or potential witnesses at government expense. *See, 2011 Operations Manual ICE Performance-Based National Detention Standards* (hereinafter

"PBNDS"), 5.6 (Telephone Access) at 4-5, (Dec. 2, 2008), http://www.ice.gov/detention-standards/2011/. In the extremely limited circumstances in which ICE permits free phone calls, such as to contact a government office, ICE standards require that detainees complete a form and wait for often overburdened facility staff to complete the request. Even detainees able to pay face obstacles in placing calls due to problems with phone functionality in detention facilities. *See generally, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Compliance*, at 16, (Jul. 2007), http://www.gao.gov/assets/270/263327.pdf.

2. *Receiving a telephone call*

Inability to receive phone calls presents another major problem for detainees seeking to marshal evidence showing that they are not removable as charged. Often the court official, law enforcement officer, or attorney whom the detainee called may be unavailable. A particular clerk may be out for the day, or a busy defense attorney may be in court or in a client meeting. In normal life, the solution is simple: the caller leaves a message and the recipient returns the phone call at a later point. This is rarely an option for detainees. On any given day, approximately 78 percent of detainees (more than 25,000) are in facilities that prohibit attorneys from scheduling calls with their clients. *See, e.g.*, Nat'l Immigrant Just. Cntr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention*

Facilities Jeopardizes a Fair Day in Court, at 4-5, 9, (2010), https://www.immigrantjustice.org. The detention system thus exacerbates the difficulties that *pro se* individuals would face in attempting to re-litigate complicated and often distant incidents.

3. *Facsimile and email*

Common alternatives to phone communication – namely, fax and email communications – are not available options for detainees. *Cf.*, PBNDS 5.1 (Correspondence and Other Mail), at 282. Detainees currently have no access to the internet. *Cf.*, PBNDS 5.6 (Telephone Access), at 305.

4. *Communication by post*

Communication by post – although more available to detainees than phones, fax machines, or internet – is a time-consuming and frequently unsuccessful alternative. The most common problem with postal communications is that detainees in removal proceedings face tight deadlines. Even assuming optimal rates of delivery, the normal delays inherent in mailing request forms and case files back and forth often would leave detainees unable to obtain evidence quickly enough for use at trial.

5. *Transfers in immigration detention*

In addition to the problems created by natural slowness of mail service, postal communication is frustrated because ICE detainees are transferred frequently and unpredictably between immigration detention facilities. ICE detention standards do not provide for forwarding of mail from transferring facilities. *See,* PBNDS, 5.1 (Correspondence and Other Mail); PBNDS, 7.4 (Detainee Transfers).

The absence of a mail forwarding requirement has a dire impact on detainees. In 2009, more than half of detainees were transferred at least once, and between 1998 and 2010, 46 percent of all detainees were moved multiple times. *See, Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States*, at 14, 17 (2011), http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf. One detainee was reportedly transferred 66 times. *Id.* at 17. Detainees contesting removal and seeking relief generally are held longer than detainees who do not contest their removal, and the chances of transfer increase as detention time lengthens. *Id.* at 25-26.

With no mail forwarding, detainee mail is commonly returned or lost as a result of these transfers. Even when a detainee is fortunate enough to receive requested records, such records commonly become lost or inaccessible after transfer to a new facility because personal property is rarely transferred with detainees. *See,* Karen Tumlin,

Linton Joaquin, & Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers*, at 41-42, 70, (2009), http://www.nilc.org/document.html?id=9.

6. *Remote facilities*

The aforementioned problems with mail, phone, or more modern communication methods cannot be avoided through in-person communication with family and friends because immigration detention facilities are commonly located in remote areas far from a detainee's home, family, or court of conviction.[4] *See,* Dora Schriro, *Immigration Detention Overview and Recommendations*, at 23-24, (Oct. 6, 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

The structural barriers identified above frustrate the efforts of even the most determined and capable

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[4] The Agency's venue rules do not require that proceedings be brought in a district where the immigrant resides or was arrested; Department of Homeland Security may initiate removal proceedings anywhere in the country. *See,* 8 C.F.R. § 1003.14; *see also, Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995). For instance, an immigrant might be placed in removal proceedings on return from travel abroad. *See, e.g., Vartelas v. Holder*, 132 S.Ct. 1479, 1485 (2012). If inspectors at an airport far from home believed the immigrant to be deportable, the agency would likely detain her at a facility near to that airport rather than transporting her to a facility close to friends and family.

pro se litigants. The result is that the majority of detainees in the vast immigration detention system have no realistic ability to secure documentation or other evidence to support a factual claim like the one at issue in this case.

D. *Language barriers and limited education levels magnify procedural hurdles to obtaining case records.*

Many detainees face additional and immense obstacles to obtaining case records by virtue of limited English-language skills and limited educational levels. Surveys indicate that approximately 83 percent of immigrants in removal proceedings are not fluent in English. *See, Executive Office for Immigration Review, FY 2010 Statistical Year Book, F-1, Figure 8,* (2011), (illustrating percentage of immigration court proceedings conducted in languages other than English).

Nearly half of immigrants have not completed high school. *Educational Attainment in the United States: 2009*, (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (finding percentage of foreign-born Hispanics who had completed at least high school was 48 percent). Indeed, a substantial number have had no schooling at all, and may be functionally illiterate. *See,* Elizabeth Grieco, *Educational Attainment of the Foreign Born in the United States*, (July 2004), http://www.migrationinformation.org/feature/display.cfm?ID=234 (finding that 1.4 million foreign born individuals over age 24 had completed no schooling,

including over 11% of foreign-born individuals from Mexico).

E. *Bureaucratic and logistical obstacles to locating and accessing case records.*

Even English-speaking detainees with the ability to communicate freely with the outside world face great obstacles in requesting case records. Such detainees still must locate the correct records department, find the correct request form, and determine the accepted means of payment. They also must know the specific names of the criminal court documents they wish to request and, depending on the jurisdiction, may need additional information about the documents themselves (e.g., internal court index number, filing date, and names of parties). *See e.g.*, Monroe County Clerk, *Court and Land Records*, http://www.monroecounty.gov/clerk-records.php (last visited Mar. 1, 2012). Different jurisdictions house records in different departments, and detainees may be unable to determine whom to contact to make records requests and the procedures necessary to make those requests. *Compare* Superior Court of California, San Mateo County, Records Management, *Request Copies by Mail*, http://www.sanmateocourt.org/court_divisions/records_management/request_by_mail.php (last visited Mar. 1, 2012) (requiring one to contact the Superior Court by mail for a records request), with Monroe County Clerk, Court and Land Records (requiring one to contact the County Clerk by mail, phone, or fax for a records request).

Even when *pro se* detainees are able to properly identify both the necessary records and the proper recipients of requests, payment for records presents yet another hurdle. Records departments often charge for the time it takes to search for records, for each page copied, and for certification of records. *See, e.g.*, Superior Court of California, San Mateo County, *Records Management Fees*, http://www.sanmateocourt.org/court_divisions/records_management/fees.php (last visited Jun. 26, 2012). Many state court records departments accept only checks or credit cards rather than cash or money orders (which forms of payment are more available to detainees and their families). *See, e.g.*, Monroe County Clerk, Court and Land Records.

Each of these obstacles reinforces the others in a tragic feedback loop. An individual not fluent in English may misunderstand what she needs to send to a records department, resulting in a form being returned for minor procedural problems, such as improper form of payment. Because most exchanges must occur by mail due to inaccessibility of phone, fax, and email communication in detention centers, and because of frequent detainee transfers, exchanges result in weeks if not months of delay in immigration court cases. Compounding the problem, the immigration court may choose at any point to proceed to trial on removability notwithstanding a detainee's inability to obtain records necessary to their defense.

F. *Detainees face expedited proceedings where continuances are discretionary and limited.*

Immigration courts feel pressure to rapidly complete matters in detained cases. The immigration court system has "case completion goals" which call for most detained cases not involving asylum to be completed within 120 days. *See*, Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement, GAO-06-771,* at 21, (August 2006), http://www.gao.gov/assets/260/251155.pdf. Immigration judges are "evaluated" in part based on their success in meeting those goals. *Id.* at 20. Thus, continuance requests are frequently denied because the case has gone on too long. *See, e.g., Hashmi v. Attorney General of the United States*, 531 F.3d 256, 260 (3d Cir. 2008) (considering case in which immigration judge denied motion for continuance "based solely on concerns about the amount of time required to resolve Hashmi's case"); *Badwan v. Gonzales*, 494 F.3d 566, 569-70 (6th Cir. 2007) (considering appeal from immigration judge's denial of motion for continuance because of "the case completion rules of the Court, and the Court's directive to complete cases," explaining that "we're under severe constraints in terms of making certain that cases are handled in an expeditious manner").

The case of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), graphically illustrates the process facing detainees whose cases turn on factual matters requiring investigation. Dent attempted to secure documents necessary to prove his U.S. citizenship. Dent – a fluent English-speaker – was lucky. He wrote a letter from his Arizona jail to the Arkansas attorney who had handled his adoption 20 years earlier, and the attorney responded. *Id.* at 369. That attorney was able to send him various documents tending to prove his citizenship; but a fire had destroyed his adopted mother's birth certificate (the attorney was attempting to locate her passport instead). *Id.* Despite his English proficiency and attorney assistance, Dent was unable to gather factual evidence quickly enough for the immigration court. The immigration judge declined to grant further continuances, and ordered removal, reasoning that Dent might be able to obtain proof of his citizenship once deported to Honduras. *Id.* at 369-70. Perversely, unbeknownst to Dent, the proof of his citizenship was in the government attorney's file the entire time.

In *Amici*'s extensive experience practicing before diverse immigration courts, the circumstances of Dent's case are tragically typical. Indeed, in *Amici*'s advisals to *pro se* individuals and reviews of transcripts of *pro se* removal hearings, immigration judges commonly deny continuances requested by detainees seeking additional time to prepare their case.

II. FACT-INTENSIVE TRIALS BURDEN BOTH THE IMMIGRATION COURT SYSTEM AND DETAINEES, AND LACK THE EFFICIENCY, UNIFORMITY AND JUSTICE OF THE CATEGORICAL APPROACH.

The novel non-categorical approach urged by Respondent requires a presentation of specific facts of sometimes very old incidents by immigrants for whom federal law mandates detention but not counsel. 8 U.S.C. § 1226(c). This lengthens detentions and delays cases. For individuals like Moncrieffe, permitting a non-categorical approach to determine whether a immigrant's marijuana conviction would correspond to a federal misdemeanor will place undue burdens on immigration judges and extend detention. This creates an unworkable system for both immigration courts and detainees.

A. *The non-categorical approach would burden an already overtaxed immigration court system.*

Immigration judges play an active role in removal proceedings. They not only direct proceedings and accept filings, but they are required to advise immigrants of potential forms of relief. 8 C.F.R. § 1240.11(a)(2). Each immigration judge handles more than 1,200 cases per year, with the assistance of only one law clerk for every four judges. *See,* American

Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, Executive Summary*, ES-28 (2010), http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

The American Bar Association reports that the "enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload, and it has been extremely challenging to adjudicate cases fairly." *Id.* at ES-5, ES-19-20 ("immigration courts complete more than 280,000 proceedings each year — an average of 1,243 proceedings per year for each immigration judge"). The fact that the courts are overburdened triggers other adjudicative problems that also serve to undermine fairness. *See,* Appleseed, *Assembly Line Injustice,* Ch. 2 p. 10 (May 2009).

Given their backlogs, immigration judges are obliged to adjudicate removal proceedings quickly. *See, Id.* As a result, immigration judges take "less than two hours on average to review each case file, conduct a hearing and render a decision." *Id.*

The categorical inquiry is a purely legal determination that immigration judges already routinely make on behalf of *pro se* litigants. The categorical analysis applied in the context of this case allows a fair, efficient, and predictable practice through which immigration judges can make aggravated felony determinations by inquiring into

the elements of a criminal statute, informed when appropriate and necessary by reference to "a narrow, specified set of documents that are part of the record of conviction." *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1007 (9th Cir. 2008) (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004).

By contrast, Respondent's proposed framework would exact enormous costs on an already overburdened immigration bench and backlogged court system. In effect, immigration judges would be forced to choose among the lesser of two evils: (1) deny requests for continuances necessary to permit detained *pro se* litigants the opportunity to marshal facts to defend their cases, thus maintaining docket efficiency at the expense of accuracy, uniformity, and just results – likely triggering appeals – or (2) grant repeated continuances to permit detainees a fair opportunity to prove their cases, at the expense of docket management and uniformity across cases. Whatever the choice, Respondent's system would undermine the workings of the immigration court system. A rule that undermines the system for adjudication of removal cases directly affects the individuals who must be judged by that system.

B. *The proposed non-categorical approach would be fundamentally unfair to detainees.*

Applying a non-categorical approach would create an unworkable system in which immigrants face a grave deprivation of liberty – one this Court has described as the "loss 'of all that makes life worth

living.'" *Knauer v. United States*, 328 U.S. 654, 659 (1946) (citation omitted). This is because the non-categorical approach requires a factual trial in a court that lacks the procedural protections necessary to ensure a fair hearing. Unrepresented immigrants, lacking an adequate understanding of the legal standards at issue in their cases and often detained without resources for legal and factual investigation, will be unable to develop an appropriate factual record effectively or efficiently. *See, Smith v. Hooey*, 393 U.S. 374, 380 (1969) ("Confined in a prison, perhaps far from the place where the offense . . . allegedly took place, [a prisoner's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired").

Respondent's approach would unrealistically force detainees to litigate complex factual issues related to events that many times would have occurred years or even decades in the past. *See, Barker v. Wingo*, 407 U.S. 514, 532 (1972) (holding, in the context of the Sixth Amendment, that "the inability of a defendant adequately to prepare his case [as a result of long delays] skews the fairness of the entire system" – a fundamental fairness concern that also sounds in the Fifth Amendment's due process clause).[5]

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[5] Even if the records were accessible to detained *pro se* immigrants, many criminal proceedings involving low-level marijuana charges would not include any evidence pertaining to quantity or remuneration because those are not elements of the offense under state laws. *See, Amicus* Brief for the Center on the Administration of Criminal Law, 7-14. What is more, the state court would not commonly resolve any factual disagreements once a plea of guilty or *nolo contendere* was entered. The plea need not reflect reality; courts uphold pleas

The combination of lack of representation and inability to investigate evidence while detained will be fundamentally unfair to immigrants if this Court permits aggravated felony adjudications to be transformed into fact-intensive retrials of past criminal convictions; a system in which adjudication of the case depends on development of a factual record will inevitably result in unwarranted findings of removability or ineligibility for relief for *pro se* individuals.

C. *The categorical approach would create uniformity and accuracy in adjudication of immigration court cases.*

Amici's experience shows that the traditional categorical approach better advances the goals of uniformity and accurate adjudication. To the extent that the categorical test might be under-inclusive of

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even to non-existent offenses. *See, e.g., Dale v. Holder*, 610 F.3d 294 (5th Cir. 2010) (involving plea to attempted recklessness, a legal impossibility). An individual may plead guilty or *nolo contendere* despite having a plausible defense, which benefits the criminal justice system; the *quid pro quo* is that the defendant pleads guilty to a limited set of charges and may obtain a lower sentence. *See, Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). Under Respondent's approach, immigration courts would treat the immigrant's plea as foreclosing any argument against guilt – giving the prosecution the benefit of the guilty plea – but would decline to give the immigrant the benefit of the deal (which would require the immigration court to treat them as guilty of only the minimal conduct necessary to support the plea). *Cf., Matter of Fortis*, 14 I & N Dec. 576, 577 (BIA 1974); with *Aruna*, 24 I. & N. Dec. at 455-57.

certain fact scenarios, the discretionary standards for relief eligibility take into account the seriousness of the actual offense. *See, Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1999). Serious offenses make it more difficult to show rehabilitation; and a showing of rehabilitation is generally required before immigration judges exercise positive discretion in cases. *Id.* at 12. In short, even if the categorical test would permit a small number of people to be considered eligible for discretionary relief where the conduct underlying their convictions might in fact have fit within the aggravated felony category, the costs to the system would be limited because undeserving applicants will be weeded out in the immigration judges' exercise of discretion.

The costs to the system from the rule advanced by Respondent would be significant. Those system costs would be passed on to already overburdened courts and to detainees like Moncrieffe, who would suffer longer periods of detention. That alone would be problematic. The effect of an aggravated felony finding is to require removal without exception, barring immigration judges from considering a one-time exercise of mercy for longtime residents of the United States, and their U.S. citizen family members. Respondent's novel approach is misguided and deeply flawed. The Court should reject it.

CONCLUSION

For the foregoing reasons, *Amici Curiae* National Immigrant Justice Center and Americans for Immigrant Justice respectfully urge the Court to reverse the decision below.

Respectfully submitted,

CLAUDIA VALENZUELA
SARAH ROSE WEINMAN
CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, IL 60601
(312) 660-1370

WILLIAM LYNCH SCHALLER
COUNSEL OF RECORD
ELIZABETH YINGLING
BRANDON MOSEBERRY
ANGELA VIGIL
BAKER & MCKENZIE LLP
300 E. RANDOLPH
CHICAGO, IL 60611
(312) 861-8000
William.Schaller@bakermckenzie.com

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Counsel for Amici Curiae